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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC GAS AND ELECTRIC COMPANY and
WISCONSIN POWER & LIGHT COMPANY,
Petitioners

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7641

ALABAMA POWER COMPANY, UTAH POWER & LIGHT COMPANY, PACIFIC GAS & ELECTRIC COMPANY, the MONTANA POWER COMPANY, WISCONSIN POWER & LIGHT COMPANY, and PACIFIC POWER & LIGHT COMPANY,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

September 17, 1982

Petitions for Review of an Order of the
Federal Regulatory Commission

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

OPINION OF THE COURT OF APPEALS
ISSUED SEPTEMBER 17, 1982

HATCHETT, Circuit Judge:

We are faced with a purely legal question regarding the statutory construction of section 7(a) of the Federal Power Act (Act), 16 U.S.C.A. § 800(a) (West 1974). We affirm the decision of the Federal Energy Regulatory Commission.

I.

BACKGROUND

The Federal Power Act, 16 U.S.C.A. § 791a et seq. (West 1974), authorizes the Federal Energy Regulatory Commission (once known as the Federal Power Commis-

sion) to license public and private entities for the purpose of developing water power projects.[1] Licensees may develop these projects on waters over which the United States has jurisdiction, and may operate the projects for profit. A license is granted for a term of up to fifty years, at the expiration of which the United States may recover the project for its use or issue a new license to the same or a new entity. If the Commission grants a new entity a license, compensation must be paid to the original licensee for its "net investment" plus "severance damages."[2] This case involves a contest among poten-

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[1] A "water power project" includes all facilities needed to harness the energy of flowing water to produce turbine generated electric energy.

[2] The term net investment is defined at 16 U.S.C.A. § 796 (1974) to mean:

> (13) "net investment" in a project means the actual legitimate original cost thereof as defined and interpreted in the "classification of investment in road and equipment of steam roads, issue of 1914, Interstate Commerce Commission", plus similar costs of additions thereto and betterments thereof, minus the sum of the following items properly allocated thereto, if and to the extent that such items have been accumulated during the period of the license from earnings in excess of a fair return on such investment: (a) Unappropriated surplus, (b) aggregate credit balances of current depreciation accounts, and (c) aggregate appropriations of surplus or income held in amortization, sinking fund, or similar reserves, or expended for additions or betterments or used for the purposes for which such reserves were created. The term "cost" shall include, insofar as applicable, the elements thereof prescribed in said classification, but shall not include expenditures from funds obtained through donations by States, municipalities, individuals, or others, and said classification of investment of the Interstate Commerce Commission shall insofar as applicable be published and promulgated as a part of the rules and regulations of the Commission. . . .

The term "severance damages" is explained in 16 U.S.C.A. § 807 as follows:

> (a) . . . [B]efore taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reason-

tial licensees, including the present license holder, for a new license and presents the question of the preference due a municipal applicant.

Section 7(a) of the Act provides in pertinent part: ". . . in issuing new licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, ..." [3] Section 15(a) also

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able damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Chapter by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee. . . .

[3] Section 7(a) of the Federal Power Act, 16 U.S.C. § 800(a) provides:

Sec. 7. [*As Amended August 26, 1935 and August 3, 1968.*] In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and *in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefore by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted,* or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans. [41 Stat. 1067; 49 Stat. 842; 16 U.S.C. 800(a)] **[Emphasis added.]**

states that: ". . . the Commission is authorized to issue a new license to the *original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions *to a new licensee*, ..." (Emphasis added.) [4]

The petitioners are thirty-eight privately owned utility companies licensed by the Commission to operate water projects.[5] The intervenors are publicly owned utilities that support the Commission's ruling.[6]

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[4] Section 15 of the Federal Power Act provides:

> Sec. 15. [*As Amended August 3, 1968.*] (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof . . . , the commission is authorized to *issue a new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, *or to issue a new license under said terms and conditions to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in section 14 hereof . . . : *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid. [Emphasis added.]

[5] The thirty-eight privately owned utility companies have categorized themselves for purposes of this case into three groups; the hydroelectric utility company group; Pacific Gas & Electric Co.; and Utah Power & Light Co., Montana Power Co., and Wisconsin Power & Light Co.

[6] The publicly owned utilities that have intervened to support the Commission's opinion are: the American Public Power Association; the City of Bountiful, Utah; the City of Santa Clara, California; and the Clark-Cowlitz Joint Operating Agency, Washington.

The competitors in this case are the City of Bountiful, Utah, a municipality, and Utah Power & Light Company, a private utility. Both entities applied for a license to operate the hydroelectric project operated by the private utility (Utah Power & Light) under a license which expired several years ago. The city of Bountiful, during the license contest, asked the Commission for a declaratory ruling clarifying its entitlement to the statutory preference in section 7(a). The Commission consolidated Bountiful's petition with that of another municipality that also sought a declaration of preference and initiated proceedings to resolve the issue.

Since only declaratory relief was requested, the Commission considered, as does this court, the issue to be one of statutory construction. The Commission issued two opinions on this matter. In its opinion and order declaring municipal preference applicable to hydroelectric relicensings, *City of Bountiful, Utah* (Opinion No. 88), No. EL78—43 (F.E.R.C. June 27, 1980), the Commission held:

> [T]he preference of Section 7(a) of the [Act] favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources.

The Commission found that the preference to states and municipalities only applied where the plans submitted by the states or municipalities were as "equally well adapted" as the plans submitted by citizens or corporations. In essence, the Commission held that the preference given to states and municipalities by section 7(a) of the Federal Power Act always applies regardless of the identity of the parties competing for reissuance of a license. The Commission stated, however, that a state or municipality would gain the benefits of this preference only in a "tie-breaker" situation. The Commission subsequently denied rehearing, *City of Bountiful, Utah* (Opinion 88-A), No.

EL78—43 (F.E.R.C. June 27, 1980), and petitioners brought this appeal.

II.

JURISDICTION

At the outset, we are faced with a jurisdictional question. Although all parties to this proceeding urge us to reach the merits, we cannot do so if we lack the power to act because the issue is not ripe for judicial review. Since the Commission only ruled in a declaratory fashion, we must determine whether this case is ripe for review in the absence of a final ruling on a particular license application. The Commission has not granted a license to any of the parties to this proceeding, and since the rule announced by the Commission only applies in a "tie-breaker" situation, it is arguable that the ruling herein may never concretely affect any of the parties. Courts are reluctant to apply declaratory judgments to administrative determinations "unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed. 2d 681 (1967). In explaining the ripeness doctrine, the Supreme Court stated that its basic rationale was "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . ." 387 U.S. at 148, 87 S.Ct. at 1515. The Court also stated that the ripeness doctrine protects administrative agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." 387 U.S. at 148-49, 87 S.Ct. at 1515-16. The *Abbott* Court endorsed a two-step approach for analyzing ripeness which requires that we "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." 387 U.S. at 149, 87 S.Ct. at 1515.

The Supreme Court set forth four important factors to be used in making this evaluation. The four factors are:

(1) whether the issues presented are purely legal;

(2) whether the challenged agency action constitutes "final agency action," within the meaning of Section 10 of the Administrative Procedure Act, 5 U.S.C.A. 704 (West 1977);

(3) whether the challenged agency action has or will have a direct and immediate impact upon the petitioners; and

(4) whether resolution of the issues will foster, rather than impede, effective enforcement and administration by the agency.

Pennzoil Co. v. *FERC*, 645 F.2d 394, 398 (5th Cir. 1981), (quoting *Abbott*, 387 U.S. at 149-54, 87 S.Ct. at 1515-18). A complete recitation of the factors supporting our conclusion is unnecessary. After full consideration, we find that the issue presented is purely legal, that the challenged agency action will have a direct and immediate impact upon the petitioners, the states, and all potential applicants, as well as the workload of the Commission. We further conclude that resolution of this issue now will foster effective enforcement and administration by the agency. The issue is ripe for judicial review. Having resolved this jurisdictional issue, we turn to the merits.

III.

MUNICIPAL PREFERENCES: "NEW" v. "ORIGINAL LICENSES"

Petitioners contend that when Congress provided in section 7(a) of the Federal Power Act, 16 U.S.C.A. § 800(a) (West 1974), that the Commission give a relicensing preference to states and municipalities "in issuing licenses to new licensees under section 15 hereof," it intended the preference to be given to "new licensees" as defined in section 15, 16 U.S.C.A. § 808 (West 1974). They further posit that section 15 distinguishes the term "new licensee"

from the phrase "original licensee." Because Congress clearly differentiated between the two terms, petitioners argue that it could not have intended the words "new licensee" to include the holder of the expired license. Thus, petitioners assert that the relicensing preference in section 7(a) is inapplicable to original licensees, but applies only to applicants seeking to acquire the project for the first time. The petitioners contend that the Commission clearly erred in interpreting section 7(a) because it necessarily concluded that Congress meant "any" when it said "new" in the Act.

We must determine whether in issuing licenses to new licensees under section 15 of the Act the Commission must apply a preference in favor of municipalities and states against all competing applicants or whether the preference applies only when the competing applicants are persons or entities other than the original licensee.

Section 7(a) provides a preference for states and municipalities in three situations:

(1) In issuing preliminary permits;

(2) In issuing licenses where no permit has been issued; and

(3) In issuing licenses to new licensees under section 15.

We are concerned only with the third situation. The petitioners urge that we apply the plain meaning of the words "new licensees," as defined in the statute. They contend that the Commission erred in relying on the legislative history of the term "new licensees" cautioning that legislative history is relevant only if the term has no plain meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978).

We agree with petitioners that statutory interpretation must begin with the language of the statute which must be interpreted in accordance with its "plain meaning."

Fitzpatrick v. *IRS*, 665 F.2d 327 (11th Cir. 1982); *United States* v. *Anderez*, 661 F.2d 404 (11th Cir. 1981). We should depart from the official text of the statute and seek extrinsic aid for ascertaining its meaning only if the language is unclear or if apparent clarity leads to absurd results when applied. *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982). On the other hand, a reviewing court generally should adhere to the construction of a statute made by the agency charged with its execution unless there are compelling reasons indicating such construction is wrong. *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668 (5th Cir. 1981). In *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940), the Supreme Court emphasized that where the plain meaning leads to results that are absurd or at variance with the policy of the enactment, a reviewing court may seek guidance wherever available. The Court stated:

> When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination."

310 U.S. at 543-44, 60 S.Ct. at 1063-64 (footnotes omitted).

Like the Commission, we easily overcome the plain meaning hurdle. The fact that the public companies here have accorded one reasonable interpretation to the words "new licensees" by relying on its context in section 7(a), and that private interests have accorded a different but reasonable meaning to the phrase by following the reference in section 7(a) to section 15 suggests that the meaning of the term "new licensees" is sufficiently ambiguous to merit resort to legislative history.

The commission must act in each of the three licensing situations outlined above. As to all three, the Act clearly gives two different preferences. First, the Act gives a preference to states and municipalities when their plans

are "as equally well adapted" as those of a private applicant. Second, the Act gives a preference as between applicants other than states and municipalities for plans best "adapted to develop, conserve, and utilize in the public interest the water resources of the region." These preferences cover all situations concerning competing applications. To follow the petitioners' theory of a "limited preference" in favor of municipalities and states against new applicants only when incumbent licensees are not competing changes the statute's entire preference structure. Instead of the two preferences outlined above applying to all cases, the preferences would operate only in some cases. We are not convinced that Congress intended such a result, which would cause administration of the Act by the Commission to be confusing and sporadic. Likewise, the adoption of a "limited preference" advantages incumbent licensees and thus leads to an absurd result. Under this theory, the only time a license holder would fail to obtain reissuance of a license would be when the water project was not profitable. Thus, states and municipalities realistically would have no preference at all because a preference to a losing project is worthless. Petitioners' position would lead to even more absurd results where the state or municipality was the license holder. By reapplying for the license, the state or municipality would lose its preference.

In finding that the state and municipal preference applies to all cases, the Commission properly relied heavily upon legislative history because the plain meaning advanced by petitioners leads to absurd results. The evidence on which the Commission relied included:

(1) A memorandum which was used in preparation of the Act, written on October 31, 1917 by Mr. O. C. Merrill, conceded by all parties to be an authority;[7]

[7] Among the materials relied on by the Commission was a memorandum written on October 31, 1917, by O. C. Merrill, which ex-

(2) testimony of witnesses for power companies before congressional committees; [8]

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plained the objectives of the municipal preference. The memo, in pertinent part, provided:

> Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. *In such disposition the order of preference should be as follows:* (1) *the United States—to acquire* properties and operate them for Governmental purposes, (2) the State or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy.

[8] The Commission also relied upon testimony before the House Special Committee where a witness for private industry supporting the bill stated: (Hall is the witness.)

> MR. CANDLER. Now then you do understand that under this bill the Government of course has the first right to retake the property?
>
> MR. HALL. Yes, sir.
>
> MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the licenses might be preferred over the first licensee?
>
> MR. HALL. The bill provides that; yes, sir. They can take it away and give it to somebody else.
>
> MR. CANDLER. *Then the original licensee would have only the third opportunity to count on his lease.*
>
> MR. HALL. *That is the way I understand it.* . . . [Emphasis added.]

The Commission also relied on a conversation between a member of the House Committee and the Secretary of the Interior at Special Committee Hearings. That colloquy was:

> Mr. Hamilton. Mr. Secretary, I understood you to say that as between the original licensee and another, assuming there is a licensee who is a bidder at the end of 50 years, as between him

(3) the fact that the House-Senate Conference Committee rejected a bill proposed by the senate, which contained a different preference from that under examination, and the fact that the conference committee accepted the House bill which provided the present preference;

(4) correspondence between persons interested in the bill such as Gifford Pinchot, President of the National Conservation Association, and writings of O. C. Merrill.[9]

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and the other bidder, you would give the preference to the original licensee?

Secretary Lane. At the same figure.

Mr. Hamilton. Would you give that preference to the original licensee, assuming that the other bidder was a municipality?

Secretary Lane. I do not think I would.

[9] The Commission also relied upon a letter of Gifford Pinchot, President of the National Conservation Association, to the Chairman of the Committee on Commerce, which stated, in part:

> The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not be accomplishing this purpose surely, unless you insert after the word "issued" on line 11, page 12, of your bill, the words "and in issuing licenses to new licensees under Sec. 15 hereof," or words of like import.

Letter from Gifford Pinchot to Senator Jones (June 25, 1919), *reprinted in City of Bountiful, Utah*, slip op. at 28.

Section 7 of the bill was then changed to include the Pinchot language.

> In the development of water power by agencies other than the United States, the bill gives preference to States and municipalities over any other applicant, both in the case of new developments and in the case of acquiring properties of another licensee at the end of a license period.

The Commission also relied upon the writings of O. C. Merrill, who shortly before the President signed the bill, explained the preference section as follows:

> For development by agencies other than the United States preference is given to States and municipalities. A similar preference is given for the acquisition of the properties of other licensees at the end of a license period.

Memorandum from O. C. Merrill to President Wilson (June 8 or 9, 1920), *reprinted in City of Bountiful, Utah*, slip op. at 31.

Although much of this material is weak, for the purpose of determining legislative intent, it is helpful and apparently all that is available.

We have reviewed the Commission's interpretation of this statute and deem such construction consistent with the statute's language, structure, scheme, and available legislative history. We must give great deference to the Commission's statutory interpretation. The Supreme Court has announced the rule that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .' " *CBS, Inc.* v. *FCC*, 453 U.S. 367, 382, 101 S.Ct. 2813, 2823, 69 L.Ed.2d 706, 720 (1981). The Fifth Circuit has also applied this principle in reviewing FERC decisions. *Falcon Petroleum* v. *FERC*, 642 F.2d 780, 783 n.3 (5th Cir. 1981). We are aware of petitioner's assertion that the Commission has inconsistently interpreted section 7(a), but dismiss this argument as insubstantial and speculative. The statutory interpretation urged by petitioners is outweighed by Commission interpretations, even if inconsistent, not based upon activities contemporaneous with passage of the statute.

CONCLUSION

We hold that the state and municipal preference in section 7(a) of the Federal Power Act applies in all competitive relicensing cases, not just those where the original licensee is not an applicant. We further hold that the preference applies in a tie-breaker situation.

Accordingly, the order of the Commission is affirmed.

AFFIRMED.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL78-43

CITY OF BOUNTIFUL, UTAH
UTAH POWER AND LIGHT COMPANY
CITY OF SANTA CLARA, CALIFORNIA
PACIFIC GAS AND ELECTRIC COMPANY

OPINION NO. 88

OPINION AND ORDER DECLARING MUNICIPAL PREFERENCE APPLICABLE TO HYDRO-ELECTRIC RELICENSINGS

(Issued June 27, 1980)

Before Commissioners: CHARLES B. CURTIS, Chairman; GEORGIANA SHELDON, MATTHEW HOLDEN, JR., and GEORGE R. HALL.

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INTRODUCTION

On June 10, 1920, President Wilson signed the Federal Water Power Act (FWPA), terminating a controversy between private power interests and conservationists that was equal in many respects to the recent and current controversies involving our nation's other energy resources. That Act created the Federal Power Commission and authorized it, among other matters, to issue licenses not exceeding 50 years for the development of our nation's water power resources. The first paragraph of Section 7 of the FWPA directed the Commission [1] to give preference to applications of "States" [2] and "Municipalities" [3] in certain situations. Although President Wilson's signature terminated the one controversy, at least for the time being, it initiated the principal controversy in this proceeding—whether that State and municipal preference applies in a relicensing proceeding against a licensee that has applied for a successor license and is not itself a State or municipality.[4]

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[1] The term "Commission" refers to the Federal Power Commission in contexts prior to October 1, 1977, and to the Federal Energy Regulatory Commission in contexts on and after that date.

[2] The term "State" was defined in Section 3 of the FWPA and is defined in Section 3(6) of the Federal Power Act to mean "a State admitted to the Union, the District of Columbia, and any organized Territory of the United States".

[3] The term "Municipality" was defined in Section 3 of the FWPA and the term "municipality" is defined in Section 3(7) of the Federal Power Act to mean "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power".

[4] Section 4(e) of the Federal Power Act, which was Section 4(d) of the FWPA, authorizes the Commission to issue licenses to "citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality. . . ."

The significance of that controversy is essentially one of the cost to States and municipalities of acquiring generating capacity, and the correlative cost to citizens and corporations of losing generating capacity. The proviso of Section 14(a) of the Federal Power Act (FPA), which was also embodied in Section 14 of the FWPA, states,

> That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

Accordingly, States and municipalities can acquire licensed projects for public purposes pursuant to their right of eminent domain whenever they are willing to pay the *value-related* price which is constitutionally known as "just compensation". But, to the extent that States and

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The term "Corporation" was defined in Section 3 of the FWPA to mean

> a corporation organized under the laws of any State or of the United States empowered to develop, transmit, distribute, sell, lease, or utilize power in addition to such other powers as it may possess, and authorized to transact in the State or States in which its project is located all business necessary to effect the purposes of a license under this Act. It shall not include "municipalities" as hereinafter defined.

That term was modified in 1935 to include other forms of business organization and, therefore, the term "corporation" is defined in Section 3(3) of the Federal Power Act to mean

> any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, or a receiver or receivers, trustee or trustees of any of the foregoing. It shall not include "municipalities" as hereinafter defined . . .

In the context of Section 4(e) which authorizes the Commission to issue licenses to (1) citizens (including throughout this Opinion and order associations of citizens), (2) domestic corporations, (3) States and (4) municipalities, the issue is whether the State and municipal preference applies in a relicensing proceeding against a citizen or corporation licensees-applicant.

municipalities have a right upon relicensing to acquire projects that were previously licensed to citizens and corporations, they would be able to acquire licensed projects at those times whenever they are willing to pay the *cost-related* price which is embodied in the "net investment" concept of the FPA. That concept refers essentially to the cost of the project, reduced by the recovery of that cost through earnings (principally in the form of accumulated depreciation) in excess of a fair return, during the term of the previous license. That price could range from zero, to a substantial part of the cost of construction or acquisition many years ago when price levels were much lower than today, and would be considerably less than the cost of building or otherwise acquiring new generating capacity today.

The first paragraph of Section 7 of the FWPA was reenacted in 1935 with one substantive change [5] as Section 7(a) of the FPA.[6] For convenience, and since there is no material substantive difference between the two provi-

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[5] The "equally well adapted" and "best adapted" standards were modified to eliminate the words "navigation and" preceding "water resources of the region". The modifications are not material to this proceeding because, as discussed *infra*, no factual issues pertaining to specific projects are to be resolved.

[6] Section 7(a) of the FPA as so enacted reads,

> In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under Section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

sions, the present designation, "Section 7(a)", is sometimes used herein to refer to the first paragraph of Section 7 of the FWPA in contexts prior to August 26, 1935, as well as to Section 7(a) of the FPA in contexts on and after that date.

Since the vast majority of initial licenses under the two Acts were issued for the maximum term of 50 years, the Commission has had only one occasion to consider the applicability of the municipal preference [7] in a contested proceeding in which an investor owned utility, or private power interest [8] had applied for a successor license. In that case, Carolina Power & Light Company (Carolina Power), the licensee of the Walters Hydroelectric Development, Project No. 432, applied on August 7, 1973, for a new license for that project; and North Carolina Electric Membership Corporation (NCEMC) applied a year later on August 20, 1974, for an essentially identical lisence for the same project.[9] An administrative law judge decided, first, that NCEMC was not a "State" or "municipality" and could not therefore qualify for the municipal preference, and second, that the municipal preference is restricted "to situations where the original licensee does

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[7] The term "municipal preference" will refer to the first preference of Section 7(a) to applications of States and municipalities, and should be distinguished from the second or "best adapted" preference of Section 7(a), "between other applicants".

[8] State and municipal units for developing electric power are sometimes called "public power" in a collective context, and investor owned utilities are sometimes called "private power" in contradistinction. Accordingly, this controversy over the applicability of the municipal preference in relicensing situations is said to be one between public and private power interests. Cooperatives are part of "private power" in the context because they are not included within the definitions of "State" and "municipality".

[9] NCEMC's application was designated Project No. 2748, which was simply the assignment of a docket number. The new number did not signify a different "project", or unit of improvement or development, within the meaning of Section 3(11) of the FPA.

not seek renewal". In Opinion No. 757, issued March 22, 1976, the Commission affirmed his ruling that NCEMC could not qualify for the municipal preference and said that in view of that decision it would not be appropriate to address the applicability of the municipal preference at this time:

> This issue should be addressed in a proceeding where there are parties who will be affected by the application of the preference issue.[10]

At the time of the Commission's decision, the City of Bountiful, Utah (Bountiful), a municipality, and Utah Power and Light Company (UP&L), a corporation, had pending applications under Section 15(a) of the FPA for a new license for UP&L's Weber River Project (UP&L's Project No. 1744 and Bountiful's Project No. 2747). Similarly, the City of Santa Clara, California (Santa Clara),

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[10] The Commission has applied Section 7(a) in one other relicensing decision. Escondido Mutual Water Company, a not-for-profit corporation controlled by the City of Escondido, California, applied on April 1, 1971, for a new license for Project No. 176, which application was adopted by the City of Escondido as its own on November 25, 1975. Although five Bands of Mission Indians claimed that they were entitled to the municipal preference, the Commission found (Opinion No. 36, issued February 26, 1979, mimeo, at 74, n. 105) that they were not "municipalities" and, consequently, it did not reach the preference issue (mimeo, at 81 and 206). The Commission declined to issue a power or non-power license to the five Bands, and issued a new license to Escondido Mutual Water Company (a corporation), the City of Escondido (a municipality) and Vista Irrigation District (another municipality), as joint licensees, without otherwise reaching the preference issue. The Commission said (mimeo, at 81),

> Our decision is premised upon the superiority under Sections 10(a) and 7(a) of the joint Mutual/Escondido application. Assuming *arguendo* (contrary to our judgment) that the Bands' proposal is best adapted to develop, conserve, and utilize in the public interest the water resources of the region, our decision is also premised upon serious reservations as to the ability of the Bands to carry out their plans under a license or following takeover.

another municipalitity, and Pacific Gas and Electric Company (PG&E), another corporation, had pending applications for a new license for PG&E's Mokelumne River Project (PG&E's Project No. 137 and Santa Clara's Project No. 2745). On July 21, 1978, more than two years after the Commission's decision on Carolina Power's Walters Hydroelectric Development, Bountiful filed a petition requesting the Commission to issue a declaratory order that it is entitled by Section 7(a) to a preference against UP&L when the Commission issues a new license for the Weber River Project. And on August 15, 1978, Santa Clara similarly filed a petition for a declaratory order that it is entitled to such a preference against PG&E when the Commission issues a new license for the Mokelumne River Project. The Commission, on September 27, 1978, issued notice of the filing of the two petitions and their consolidation under Docket No. EL78-43.

Petitions to intervene in support of Bountiful (I)(R) and Santa Clara (I)(R) were filed by The American Public Power Association (I)(R) [11], Clark-Cowlitz Joint Operating Agency (I)(R) [12], Northern California Power Agency [13] and the City of Shawano, Wisconsin. In addition, petitions to intervene in support of UP&L (I) and PG&E (I)(R) were filed by PP&L, Carolina Power (I)(R), The Montana Power Company (I)(R), Wisconsin Power and Light Company (I), Georgia Power Company,

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[11] The American Public Power Association (APPA) is a national service organization of more than 1,400 consumer-owned utilities, including municipalities, State power authorities and districts, cooperatives and others.

[12] The Clark-Cowlitz Joint Operating Agency (JOA) is a municipality that was established in 1976 to compete for Pacific Power & Light Company's (PP&L's) Merwin Project (PP&L's Project No. 935 and JOA's Project No. 2791).

[13] Northern California Power Agency is a joint action entity consisting of the municipalities of Alamenda, Biggs, Gridley, Healdsburg, Lodi, Lompoc, Palo Alto, Redding, Roseville, Santa Clara, and Ukiah, California.

Niagara Mohawk Power Corporation, the International Brotherhood of Electrical Workers (IBEW) and the Hydro-electric Utility Company Group (I) (R).[14] A notice of intervention was also filed by The People of the State of California and the Public Utilities Commission of the State of California. All of the foregoing subsequently were permitted to participate in the proceeding. On May 3, 1979, the Commission fixed a briefing schedule and the participants designated by "(I)" and "(R)", together with the Commission staff counsel, filed initial and reply briefs, respectively. In addition, the IBEW submitted a statement.

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[14] The Hydro-electric Utility Company Group (Hydro Group) is an *ad hoc* group of the following 34 electric utility companies associated for the purpose of this proceeding:

Virginia Electric & Power Company
Alabama Power Company
Minnesota Power & Light Company
Southern California Edison Company
Public Service Electric & Gas Company
Appalachian Power Company
Pennsylvania Power & Light Company
Baltimore Gas & Electric Company
Washington Water Power Company
Jersey Central Power & Light Company
Pennsylvania Electric Company
York Haven Power Company
Carolina Power & Light Company
New England Power Company
Georgia Power Company
Duke Power Company
Niagara Mohawk Power Corporation
Northern States Power Company
Union Electric Company
Central Maine Power Company
Idaho Power Company
Wisconsin Electric Power Company
New York State Electric and Gas Corporation
Louisville Gas & Electric Company
Connecticut Light & Power Company
Hartford Electric Company
Western Massachusetts Electric Company
Holyoke Water Power Company
South Carolina Electric & Gas Company
Arkansas Power & Light Company
Public Service Company of Indiana
Puget Sound Power & Light Company
Portland General Electric Company
Pacific Power & Light Company

In our order of May 3, 1979, we indicated that our inquiry in this proceeding into the Section 7(a) municipal preference would be limited to two purely legal issues of statutory construction, as follows:

> (1) Does the preference provided in section 7(a) of the Act for a state or a municipality apply in a relicensing proceeding under section 15 of the Act against an original licensee that is neither a state nor a municipality?
>
> (2) Is a licensee which holds the original license for a project as an assignee or a successor under section 8 of the Act an "original licensee" within the meaning of section 15 of the Act?

We indicated, additionally, that we would *not* decide any factual issues under Section 7(a) pertaining to specific projects, such as whether a particular applicant's plans are (or within a reasonable time are made) as well adapted as another's plans to "conserve and utilize in the public interest the water resources of the region", and in particular that we would not decide whether Bountiful or Santa Clara is entitled to the municipal preference, if it is applicable. We said that their entitlement should be resolved in the separate relicensing proceedings in which they are parties. In view of the importance and complexity of the issues, we scheduled them for oral argument on February 22, 1980.

Within the framework of this proceeding established by our order of May 3, 1979, we view our present role as being the same as that of the District of Columbia Circuit in *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, *infra*. In other words, the principal question to be decided is not the policy issue of whether it is factually or politically wise for States and municipalities to have a relicensing preference against citizen and corporation licensee-applicants, but the legal issue of whether Congress included such a preference in Section 7 when it enacted the FWPA in 1920.

Having considered the briefs and the oral argument of February 22, 1980, we have concluded and declare, for the reasons discussed herein, that the preference of Section 7(a) of the FPA favoring States and municipalities over citizens and corporations is applicable to all relicensing applications in which States or municipalities, and citizens or corporations, request successor licenses for the same water resources. We have also concluded and declare that States and municipalities are entitled to a preference only when the Commission determines, in the exercise of its judgment, that their plans, and any competing plans of citizens or corporations for the same water resources, are equally well adapted to conserve and utilize in the public interest the water resources of the region.

THE "NEW LICENSEES" CONTROVERSY

The controversy in this proceeding focuses on the meaning of the words "new licensees" in the phrase "in issuing licenses to new licensees under section 15 hereof". The public power interests and the Commission staff counsel contend that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license) and, therefore, that a *new licensee* plainly is *any licensee* under a new license. In other words, the *new licensee* might be the licensee under the original or annual license, or any citizen, corporation, State or municipality that was a stranger to the original license and is eligible under Section 4 to become a licensee. Under their interpretation, in issuing new licenses under Section 15 *to any applicant* for a license, the Commission is directed by Section 7(a) to give preference to States and municipalities, subject to a finding of equally well adapted plans.[15]

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[15] Santa Clara reads Section 7(a) as though it states,

> . . . . in issuing *determining whether to issue* licenses to new licensees under section 15 hereof. . . .

As discussed *infra*, under APPLICABILITY OF SECTION 7(a) TO RELICENSINGS—Plain Meaning, the words "original" and

The private power interests do not dispute the contention that a *new license* is one that follows or succeeds an *original* license (or follows or succeeds an interim annual license). But they contend that Section 15(a) carefully distinguishes between new licenses that are issued to "original licensees" and new licenses that are issued to "new licensees" [16] and, therefore, that a *new licensee* as

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"new" were used in Section 15 of the FWPA and are used in Section 15(a) of the FPA as correlative terms to describe a predecessor/successor relationship in a context of successive license terms. In that context, a "new" license or licensee is a *successor* license or licensee, and an "original" license or licensee is a *predecessor* license or licensee.

[16] Section 15 of the FWPA was redesignated without change in 1968 as Section 15(a) of the FPA. It states:

> That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a *new license to the original licensee* upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a *new license* under said terms and conditions *to a new licensee*, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or new license is issued as aforesaid. [Emphasis added.]

It should be noted that the proviso refers incorrectly to the "United States" (rather than the Commission) issuing a license, and refers not consistently to the issuance of a "license to a new licensee" or a "*new* license to the original licensee" (emphasis added). The Third Circuit said, in this connection, in *Metropolitan Edison*

used in Section 7(a) plainly is *any licensee except an original or predecessor licensee.*[17] Under their interpretation, the Commission does not get to the threshold of issuing new licenses under Section 15 to *new licensees* unless the original licensee chooses not to file an application for a new license, or unless the Commission first decides not to issue a new license to the original licensee. They say that in issuing new licenses under Section 15 to *any licensee except an original licensee* the Commission is directed by Section 7(a) to give preference to applications of States and municipalities and, conversely, that the municipal preference does not apply against an original licensee.

The public power interests focus their argument on the legislative history of Section 7(a), claiming that the drafters intended to include a broad municipal preference on relicensing, that the preference was included without question in the initial legislative bill, that the subsequent modifications were for clarification rather than change of concept and, consequently, that a broad municipal preference on relicensing remained in the final bill enacted by Congress and signed by President Wilson. The private power interests, on the other hand, stress the *plain meaning* of "new licensees" derived from Section 15(a) and other provisions, claiming that it is not necessary to resort to the legislative history. They also stress a favorable

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Company v. *Federal Power Commission*, 169 F.2d 719 (Third Cir., 1948), at 723.

> To put it bluntly, there are hiatuses and inconsistencies in the Federal Power Act and, as was stated by Judge Learned Hand in Niagara Falls Power Co. v. Federal Power Commission, 2 Cir. 137 F.2d 787, 795, "* * * it is necessary * * * to break through the band of verbal logic at its weakest spot."

[17] They remind us that licensing under the FWPA and the FPA grew from a leasing concept, and that when a tenant enters into a *new lease* he remains the *original* tenant and does not become a *new* tenant. In other words, his status as a tenant doesn't change, and a *new* tenant would be anyone else. (But see note 44, *infra.*)

1968 interpretation of the General Counsel of the Commission that was transmitted through Chairman White to Congress, claiming that Congress approved that interpretation at that time.

LEGISLATIVE HISTORY OF THE FEDERAL WATER POWER ACT

Jerome G. Kerwin's *Federal Water-Power Legislation* (Columbia University Press, 1926) discusses the economic and legal aspects of water power and is perhaps the most widely recognized authoritative text discussing the legislative history of the FWPA. See, for example, *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90 (1965), and *Chemehuevi Tribe of Indians* v. *Federal Power Commission, infra.* A considerably shorter and less detailed history was written by Gifford Pinchot and published in the George Washington Law Review in 1945.

The events leading to the FWPA can be separated into two periods. The first period ended in 1917 after the hearings and debates on the early water power bills, and can be characterized as the formative period. The second period, which can be characterized as the legislative period, began in 1917 with the formalization of the final concept of the FWPA, and covers its movement through Congress.

The Formative Period (1890-1917)

According to Kerwin, the first hydro-electric plant was constructed in 1890 and, thereafter, the development of hydro-electric power proceeded at a rapid pace. But it did not proceed fast enough to suit the private power interests. They encountered problems with legislation enacted under the commerce power to keep open the lanes of navigation. And they encountered opposition from an anti-monopoly conservation movement with respect to their use of the extensive government lands in the western States.

The Rivers and Harbors Act of 1890 prohibited the creation and maintenance of unauthorized obstructions to

the navigable capacity of waters within the jurisdiction of the United States. An extension of that Act in 1899 prohibited the construction of dams in navigable waters of the United States without the consent of Congress and the approval of plans by the Chief of Engineers and the Secretary of War.

Prior to 1896, water power sites on government lands were practically given away as homesteads or by sale. According to Kerwin, they passed from government to private ownership as rapidly as the private power interests could "grab" them. In 1896 the Secretary of the Interior was authorized to issue permits to use rights-of-way not exceeding 40 acres for the purpose of generating, manufacturing or distributing electric power. That authority was broadened in 1901 and 1911; but since the permits were revocable at will and were required to be issued under general regulations that did not permit special arrangements, the private power interests were not satisfied.

In 1898 Pinchot became Chief of the Division of Forestry of the Department of the Interior. He states that Federal water power policy began in 1905 when the responsibility for national forests was transferred to the Department of Agriculture, and the new Forest Service, which he headed, chose to develop its own policy. He wrote in 1945, 14 George Washington Law Review, at 12,

> There was no question which course to adopt. We must make our own policy and *above all keep the title to the power sites in the public hands.* [Emphasis added.]

Pinchot's policy of keeping the title to power sites in the public hands at some level of government is embodied in the recapture and municipal preference provisions of the FWPA and the FPA. His views that private power interests were "water power grabbers" who were "eager for plunder" are discussed in *Chemehuevi Tribe of Indians* v.

Federal Power Commission (D.C. Cir., 1973), 489 F.2d 1207, at 1218, n.54.

In 1908 a bill was passed and presented to President Roosevelt to extend the time for constructing a power dam on the Rainy River (a Canadian boundary stream). President Roosevelt vetoed the bill and proclaimed, in a landmark veto message,

> Every permit to construct a dam on a navigable stream should specifically recognize the right of the Government to fix a term for its duration and to impose such charge or charges as may be deemed necessary to protect the present and future interests of the United States. . . .
>
> * * * *
>
> In place of the present haphazard policy of permanently alienating valuable public property we should substitute a definite policy along the following lines:
>
> * * * *
>
> Fifth. Provision should be made for the termination of the grant or privilege at a definite time, leaving to future generations the power or authority to renew or extend the concession in accordance with the conditions which may prevail at the time.

The following year President Roosevelt vetoed the James River bill, repeating the substance of his landmark message. According to Kerwin, the conservationist water power policy promulgated in President Roosevelt's two veto messages resulted from the influence of Chief Forester Gifford Pinchot and one Henry Graves. In 1910 President Taft dismissed Pinchot for insubordination after Pinchot publicly criticized Secretary of the Interior Ballinger.

In the meanwhile, the General Dam Act of 1906 fixed the conditions upon which Congress would consent, by special legislation, to the constructions of dams in navigable waters of the United States. The General Dam Act of 1910 replaced its 1906 counterpart and provided for 50-

year permits that were revocable for cause and subject to takeover by the United States on payment of reasonable value. But there was no provision for disposition of the properties at the end of the term, and only 8 of the 29 dams authorized under the two Acts were completed.

In June 1914 the Adamson bill pertaining to water power on navigable streams was introduced in the House and assigned to the Committee on Interstate and Foreign Commerce. After hearings, that bill was reported out of the committee and, following a House debate, was amended into a conservation measure and adopted. In May 1914 the Ferris bill pertaining to water power on government lands was introduced in the House and assigned to the Committee on Public Lands. After hearings, that bill was reported out of the committee, adopted by the House and sent to the Senate. After further hearings, the Senate Committee on Public Lands struck everything but the enacting clause and substituted the Myers bill favorable to private power interests. With respect to water power on navigable streams, the Senate stood behind the Shields bill, which was introduced in December 1915 and was also favorable to private power interests. The principal divisive issues pertained to charges for power privileges and recapture. President Wilson tried and failed to cause water power legislation to be enacted prior to the entry of the United States into World War I.

The most important thing to understand about the formative period is that it ended with a general understanding that if the nation's water power resources were to be preserved for the public, it would be necessary to place a time limit on a private lessee's or licensee's use of the resources, and enact nothing which would, in effect, give a right of perpetual use to a private lessee or licensee.

The Legislative Period (1917-1920)

The hearings and debates on the early water power bills provided forums in which the competing interests sharp-

ened and resolved issues. One seemingly insoluble problem, however, was the superabundance of committees with jurisdiction over some facet of water power legislation—Public Lands, Indian Affairs, Agriculture, Military Affairs, Interstate and Foreign Commerce, Foreign Affairs, and Rivers and Harbors.

In 1917 the Secretaries of Agriculture, the Interior and War caused an interdepartmental committee to be formed to draft a water power bill treating both navigable waters and government lands; and Oscar Charles Merrill, Chief Engineer of the Forest Service since 1905, was designated as the committee member from the Department of Agriculture.[18] The committee drafted a bill that was presented to President Wilson and approved by him and the three Secretaries just before the Christmas holidays in 1917. Just after those holidays the President presented the so-called Three Secretaries Bill, or Administration Bill, to certain House committee chairmen and requested the formation of a special Committee on Water Power to get that bill through Congress. The committee was authorized and, on January 15, 1918, the bill was introduced by Congressman Raker in the 65th Congress, 2d Session, as H.R. 8716.

The hearings of the Committee on Water Power lasted from March 18 to May 15, 1918, during which period Congress was preoccupied with World War I. H.R. 8716, which was treated as a substitute for the Shields bill, S. 1419, was reported out of the committee with changes,

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[18] In *United States* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953), at 305, n. 10, the Supreme Court accepted Merrill's testimony before the House Committee on Water Power as presenting the views of the Secretaries of Agriculture, the Interior and War. Merrill remained in government after Pinchot's 1910 discharge and thus was in an influential position to continue Pinchot's policies. His role in developing the FWPA is unique in that he became a principal advisor on water power to Congress, if not the principal advisor, as well as to the President and his Cabinet.

debated and changed further in the House, and passed by the House. The bill reached the Senate on September 19, 1918, and was referred to conference on September 30, 1918. The report of the conference was introduced in the House on February 26, 1919, and was passed. The Senate, however, filibustered, and the bill died.

A similarly composed special Committee on Water Power was formed in the House in the 66th Congress, and the bill as agreed to in conference in the previous session was introduced as H.R. 3184. No further hearings were held, and the bill was reported out of the committee. The House and Senate both passed H.R. 3184 with changes, and on January 17, 1920, sent it to conference. Finally, the report of the conference was approved by the House and Senate, and H.R. 3184 was sent to the President on May 31, 1920, shortly before Congress adjourned, and signed by him in time to avoid a pocket veto.

LEGISLATIVE HISTORY OF SECTION 7

Merrill prepared a memorandum dated October 31, 1917, of the principles that were to be embodied in the Administration Bill, stating in pertinent part,

> At the termination of license United States to have right to take over the plant or plants covered by the license, or to transfer them to a State or municipal corporation applying therefor, upon payment of compensation to the original licensee; otherwise the original licensee to have preference right to renewal of license upon compliance with the conditions prescribed by then existing law and regulations. Licenses should terminate at the end of the fifty-year period in order that the United States may at that time dispose of the privileges as the public interest and the law and regulations then existing may require. In such disposition the order of preference should be as follows: (1) the United States—to acquire properties and operate them for Government purposes, (2) the State

> or municipality—to acquire the properties and operate them for municipal purposes, (3) the original licensee—to secure renewal of the license under conditions prescribed by then existing law and regulations, (4) any other applicant—under similar conditions. These provisions will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy. In any event, freedom of action in this respect should not be fore-closed by legislation at the present time.

The memorandum was submitted to and approved by Secretary of Agriculture Houston, and submitted by him to President Wilson. The President approved the memorandum and gave instructions to the three Secretaries to draft a water power bill in accordance therewith.

Thereafter, Merrill drafted a bill which stated in a proviso to Section 15, consistent with the memorandum,

> That in issuing such new license, the original licensee shall have a preference right over any other applicant therefor, *except a State or municipality.* [Emphasis added.]

The hearings and debates on the early water power bills produced proponents of a relicensing preference for initial licensees. Merrill's draft contained what was apparently the penultimate appearance of such a preference prior to the enactment of the FWPA and shows clearly that original licensees were *not* to be preferred over States and municipalities. The proviso was removed from the Administration Bill prior to its introduction in Congress, thus eliminating the original licensee's preference over other private applicants, but not the municipal preference against private original licensees (which was in the first paragraph of Section 7).

The committee of the Departments of Agriculture, the Interior and War (of which Merrill was a member)

finalized Merrill's draft and presented the finalized version to the three Secretaries who, on December 14, 1917, transmitted it to President Wilson. Later that month the President presented it to certain House committee chairmen and used his influence to cause them to form a special Committee on Water Power. The Administration Bill was introduced on January 15, 1918, as H.R. 8716, and provided in the first paragraph of Section 7:

> That in issuing licenses hereunder, the commission may in its discretion give preference to application for licenses by States and municipalities for developing power for State and municipal purposes, provided the plans for the same are deemed by the commission to be adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.[19]

We observe that in the light of Merrill's memorandum dated October 31, 1917, and the absence of any words restricting the municipal preference to initial licensings, it is clear that Section 7 as introduced provided a discretionary suggestion of choice in favor of States and municipalities in all *re*licensings, as well as all initial licensings. Some of the private power interests argue, however, that the municipal preference expressed therein applied only to initial licensings because it was conditioned on a Commission finding of "plans" being adapted to the purposes indicated, which refers to the licensing of new projects. But since Section 4 then as now authorized the issuance of licenses for the construction, operation and

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[19] House Report No. 715, 65th Congress, 2d Session, dated June 28, 1918.

maintenance of project works, the finding clearly applied to plans for operation and maintenance as well as plans for construction. Similarly, the reference to "developing power" does not limit the municipal preference to initial licensing because those words can mean "generating power" as well as "constructing facilities for generating power".

During the course of the hearings of the Committee on Water Power certain representatives of private power interests indicated that they were reconciled to the proposition of a municipal preference against original licensees. For example, E. K. Hall, Vice President of the Electric Bond & Share Company, and a leading spokesman for private power, testified,[20]

> MR. CANDLER. Now then do you understand that under this bill the Government of course has the first right to retake the property?
>
> MR. HALL. Yes, sir.
>
> MR. CANDLER. Then do you further understand it that a provision of the bill further is that some of the [sic., other?] licensees might be preferred over the first licensee?
>
> MR. HALL. The bill provides that: yes, sir. They can take it away and give it to somebody else.
>
> MR. CANDLER. Then the original licensee would have only the third opportunity to count on his lease.
>
> MR. HALL. That is the way I understand it. . . .

On the other hand, at one point in those hearings Congressman Sims, Chairman of the Committee on Water Power, expressed his view that the Administration Bill

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[20] Ellen Dove, *Legislative History of the Recapture Provisions and the Net Investment Concept of the Federal Power Act*, 1966, at 459c.

did not contain a municipal preference that was applicable to relicensings. (Dove, at 509).[21]

During the course of those hearings Merrill suggested an amendment to the municipal preference of Section 7 (Dove, at 444) to carry out the purpose of Section 5 of "maintaining priority of application for a license" for citizen and corporate holders of preliminary permits who had expended funds investigating water power sites. On June 28, 1918, the Committee on Water Power committed

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[21] Dove, at 509:

> The CHAIRMAN. Mr. Secretary, it has been very seriously urged before the committee as a part of the recapture provision that we provide that if the United States Government did not want to avail itself of the recapture provision that a State or municipality which wanted the water power for State or municipal purposes should have the second opportunity and the preference over a private licensee.
>
> Secretary LANE. I think that was in one of the bills, was it not?
>
> The CHAIRMAN. It is not in this one.
>
> Secretary LANE. It seems to me that is a very reasonable proposition.
>
> Mr. FERRIS. I think that is a proposition which has been advanced by Mr. Taylor of Colorado.
>
> Mr. TAYLOR. Yes. I have always very emphatically insisted that they should have a preference right over corporations or over private individuals to take over not only water power, but coal mines and other things for the purpose of preventing extortion in towns and cities, and I hope that when we get through with this legislation that provision will be in here and that it will meet with your approval. I am earnestly hoping that if the Government itself does not see fit and desire to take over these matters at the expiration of the 50 years, the preference right shall be given first to the municipalities or States and second to the occupant or the licensee.

In context, because of the absence of an express reference in Section 7 to relicensings, Chairman Sims may have failed to realize that the language of the provision was broad enough to include relicensings.

the bill to the Committee of the Whole House [22], at which time the first paragraph of Section 7 provided,

> That in issuing preliminary permits or licenses hereunder, the commission may in its discretion give preference to applications [for licenses] therefor by States and municipalities [for developing power for State and municipal purposes] provided the plans for the same are deemed by the commission to be best adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may likewise give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interests the navigation and water resources of the region.[23]

We observe that the amendment appears to have extended the municipal preference of Section 7 to the issuance of preliminary permits, but does not appear to have eliminated that preference with respect to the issuance of licenses pursuant to outstanding preliminary permits, as Merrill had suggested. Additionally, the amendment appears to have eliminated any limitations on that preference that might have been explicit in the phrase "for developing power for State and muinicipal purposes", and to have applied the *best adapted* standard of the second preference to the municipal preference. *But there was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

On the floor of the House, Congressman Doremus proposed an amendment to Section 7 (Dove, at 623) to make the municipal preference mandatory instead of discretionary, except insofar as the Commission would have to

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[22] House Report No. 715, 65th Congress, 2d Sess. The Administration Bill was treated as an amendment of the Shields bill, S. 1419.

[23] Additions are underscored; deletions are [bracketed].

determine in its discretion whether the plans of a State or municipality were adapted to conserve and utilize in the public interest the navigation and water resources of the region. His proposal was adopted and, as approved by the House on September 5, 1918, Section 7 provided,[24]

> That in issuing preliminary permits or licenses hereunder the commission [may in its discretion] shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission [to be best] adapted to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may [likewise] give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

We observe that in addition to making the municipal preference mandatory, although subject to a finding in the discretion of the Commission, the words "to be best" were deleted so that States and municipalities would not be required to submit plans that were better than those of citizens and corporations. The word "likewise" was deleted as being "not necessary" in view of the change to the municipal preference. *There still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced.*

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[24] LS. 1419, 65th Congress, 2d Session, as printed September 6, 1918.

The debate on the floor of the House (Dove, at 623-5) shows clearly that the Commission would have discretion in administering the municipal preference. Congressman Doremus said,

> You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

The House-approved bill was referred by the Senate on September 19, 1918, to a conference, where it stalled. On February 26, 1919, the conference reported a bill [25] in which Section 7 was changed to read,

> That in issuing preliminary permits hereunder or licenses [hereunder] where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities provided the plans for the same are deemed by the commission equally well adapted to conserve and utilize in the public interest and navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The explanation of the foregoing changes in House Report No. 1147 is "Your committee thought these changes were in the interest of clarity."

It appears that the committee of conference obscured more than it clarified. It is apparent that the committee settled on the "equally well adapted" standard in the light of the disagreement of the House and the Committee on Water Power on an appropriate standard. And it is equally apparent that "hereunder" was transposed and "where no preliminary permit has been issued" was added to eliminate the municipal preference with respect to licenses that were issued pursuant to outstanding preliminary permits, as Merrill had suggested to the Committee on Water Power.

But the reference to "licenses where no preliminary permit has been issued" in conjunction with "preliminary permits" made it *appear* that the municipal preference applied only to the issuance of preliminary permits and

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[25] House Report No. 1147, 65th Congress, 3d Session.

some initial licenses; i.e., those where no preliminary permit had been issued. *In point of fact, there was no expressed intent to eliminate the municipal preference against private initial license-applicants that was contained in the Administration Bill as introduced.* In point of fact, the issuance of a successor or new license is the issuance of one "where no preliminary permit has been issued".[26] Therefore, Section 7 continued to provide a preference in favor of States and municipalities in all relicensings.

As will be seen, the language that emerged from the conference committee "in the interest of clarity" is the touchstone of the present controversy. The public power interests go back to Section 7 of the Administration Bill as introduced and argue that the municipal preference contained therein for all relicensings was never changed. The private power interests look to Section 7 as it emerged from the conference committee and argue that it contains no municipal preference for relicensings.

The report of the conference was adopted by the House but was still pending in the Senate when Congress adjourned on March 4, 1919. When the 66th Congress convened, a bill identical to that in the report of the conference was introduced as H.R. 3184 and, on June 24, 1919, was reported without change to the Committee of the Whole House. On the floor of the House, Congressman Sinnott proposed an amendment that would permit States

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[26] The language creates a latent ambiguity in a situation in which a successor license would follow an initial license which, in turn, would follow a preliminary permit. It would seem, however, that the reference to no preliminary permit having been issued means a permit immediately preceding the licence under consideration, that is still outstanding. If the committee had said, instead,

> That in issuing preliminary permits or licenses, other than licenses pursuant to outstanding preliminary permits, . . .

then, perhaps, the controversial Pinchot/Lenroot/Jones amendment, *infra*, would not have been necessary.

and municipalities to amend their plans to make them "equally well adapted" to those of competing private applicants so that such public applicants would not be foreclosed from obtaining licenses because their plans were not as well adapted. The amendment was approved on July 1, 1919, and Section 7 then read,

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, *or shall be made equally well adapted*, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region.

The House-approved bill was referred to the Senate and was reported out of the Committee on Commerce with amendments on September 12, 1919. Senate Report No. 180, 66th Congress, 1st Session, states in this connection,

> Every year that our water powers are undeveloped means a loss to the people in one form or another, almost, if not quite, equal to the cost of their development. Legislative action should be delayed no longer. We should do one of two things: We should pass legislation which will lead private capital and enterprise to develop these resources under such regulations as will give consumers good service and cheap power, or the Government itself should proceed to make this development. *This bill proceeds on the theory of private development with ultimate public ownership possible.* [Emphasis added.]

Section 7, as reported to the Senate, provided,

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the commission equally well adapted, or shall *within a reasonable time to be fixed by the commission* be made equally well adapted, to conserve and utilize in the public interest the navigation and water resources of the region; and as between other applicants, the commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the navigation and water resources of the region *if it is satisfied as to the ability of the applicant to carry out such plans.*

Although the report of the Committee on Commerce does not explain how the phrase "and in issuing licenses to new licensees under section 15 hereof" came to be added to Section 7, it was added as a result of the following events: Senator Jones, Chairman of the Committee on Commerce, and a friend of private power, had introduced a water power bill (S. 152) in which Section 7 was identical to Section 7 of the bill reported out of conference in the previous session. Senator Lenroot, a conservationist, had introduced another bill (S. 1192) that was a pro-conservationist revision of the bill reported out of conference in the previous session. On June 25, 1919, Pinchot, who was then President of the National Conservation Association, wrote to Senator Jones suggesting a number of changes for Jones' S. 152 including, with respect to Section 7,

> The obvious intention of Sec. 7, is to give preference to States and municipalities; and you will not accomplish this purpose *surely*, unless you insert after the word "issued" in line 11, page 12, of your bill,

> the words "and in issuing licenses to new licensees under Sec. 15 hereof", or word of like import. [Emphasis added.]

Pinchot took the suggested language from Lenroot's S. 1192, and that language, as suggested, was added to H.R. 3184.

We observe that there still was no expressed intent to eliminate the municipal preference against private initial licensee-applicants that was contained in the Administration Bill as introduced. The intent as expressed by Pinchot was just the opposite—to clarify Section 7 so that the municipal preference therein would "surely" apply to relicensings. If States and municipalities had such a preference against private initial licensee-applicants immediately prior to the amendment, and if "new licensees" refers to any licensees under a new license (as the public power interests contend), then the Pinchot/Lenroot/Jones amendment was of a clarifying nature, as Senate Report No. 180 characterized most of the amendments therein. But if States and municipalities had such a relicensing preference immediately prior to the amendment, and if "new licensees" refers to any licensees except an original licensee (as the private power interests contend), then the Pinchot/Lenroot/Jones amendment would have restricted the scope of the municipal preference contrary to Pinchot's conservationist philosophy. Some of the private power interests recognize that inconsistency and, therefore, argue from the language of Section 7 that States and municipalities did not have such a relicensing preference immediately prior to the Pinchot/Lenroot/Jones amendment and, therefore, that amendment gave them a limited relicensing preference [27] consistent with Pinchot's conservationist phi-

[27] Limited to situations in which private initial licensees do not become applicants for new licenses—which the public power interests contend are situations in which projects are not worth relicensing. And limited to situations in which the Commission first determines not to issue new licenses to private initial licensee-applicants

losophy. They contend that Pinchot proposed the amendment because there was either no municipal relicensing preference or an uncertain municipal relicensing preference in Section 7 in view of its silence with respect to relicensings. But that would have been a substantive rather than a clarifying change, as Senate Report No. 180 indicates. And although they also contend that the question of whether Section 7 contained a municipal relicensing preference became moot when Congress addressed relicensing in the Pinchot/Lenroot/Jones amendment, the existence or nonexistence of such a preference appears to continue to be material to the Commission's interpretation of the language of that amendment.[28]

—which the public power interests contend require a non-existent two-step relicensing procedure. If there were such a procedure, they say, the Commission would first determine whether or not to issue a new license to the initial licensee; and, if it does so, the Commission would give a *de facto* preference to initial licensees, contrary to the legislative history opposing perpetual licenses. It should be noted, in this connection, that one of the principle purposes of the 1968 amendments to the FPA was to eliminate a three-step procedure by which Congress would approve Commission recommendations not to take over projects before the Commission would fix the terms of and issue new licenses. It should also be noted that it is the practice of the Commission to decide questions pertaining to the identity of licensees and the terms of contested licenses at the same time.

[28] The Initial Decision pertaining to the Walters Hydroelectric Development (*Carolina Power & Light Company*, Project No. 432), was based on the "plain meaning" of "new licensees" in Section 7(a) and suggests that the presiding judge did not understand the legislative history of the Pinchot/Lenroot/Jones amendment. The Initial Decision states, mimeo, at 10,

> While it is true that Mr. Merrill intended the preference to also apply in renewal proceedings against the original licensee, the fact remains that Congress changed the original text by adding the word "new" before licensee in Section 7(a). The Senate Committee on Commerce Report that added the word "new" offered no comments whatsoever on this amendment.

The bill reported out of the Committee on Commerce was approved by the Senate on January 15, 1920, without change to Section 7, and the House and Senate versions were sent to conference. The Conference Report issued April 30, 1920 (House Report No. 910, 66th Congress, 2d Session) recommended that the House recede from its opposition to the Senate amendments, which were described therein as being "verbal changes" that were "desirable, as they clarify the text", with the exception that the last phrase added by the Senate would be revised to read, ", if it be satisfied as to the ability of the applicant to carry out such plans."

Merrill, under date of January 27, 1920, prepared a memorandum on the Senate amendments to H.R. 3184 which stated that the amendments to Section 7 "strengthen" it; and under date of April 27, 1920, prepared a memorandum for Congressman Lee, a member of the committee of conference, stating,

> In the development of water powers by agencies other than the United States, the bill gives preference to States and municipalities *over any other applicant*, both in the case of new developments and *in case of acquiring properties of another licensee at the end of a license period.* [Emphasis added.]

On May 4, 1920, Congressman Lee used Merrill's exact words to assure his colleagues with respect to the municipal preference (Dove, at 814), and the Conference Report was approved by the House on the same day.

The Conference Report was approved by the Senate on May 28, 1920, and H.R. 3184 was transmitted to President Wilson on May 31, 1920. Another Merrill memorandum, dated June 8 or 9, 1920, advised the President,

> For development by agencies other than the United States preference is given to States and municipalities. *A similar preference is given for the acquisition*

> *of the properties of other licensees at the end of a license period.* [Emphasis added.]

As indicated, President Wilson signed H.R. 3184 on June 10, 1920.

THE PLAIN MEANING OF "NEW LICENSEES"

Section 7(a) of the FPA provides, in pertinent part,

> . . . [I]n issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications thereof by States and municipalities. . . .

While the public power interests contend that "new licensees" plainly are any licensees under new licenses, the private power interests argue that "new licensees under section 15" are to be distinguished from "original" licensees, just as is done in Section 15(a). They say that a phrase used in different parts of a statute is to be given the same meaning throughout, unless the context clearly indicates otherwise,[29] and that a statute should be construed to give effect to all of its words.[30] And they conclude,

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[29] Their reliance on Section 22 is proper because that provision, which pertains to a "new licensee" assuming Commission-approved contracts, distinguishes between an "original licensee" and a "new licensee" in the same context as Section 15(a). But their reliance on Section 7(c) is improper, first, because that provision was not enacted in 1920, but in 1968, and second, because that provision would not be changed by omitting the underscored words:

> Whenever . . . the Commission determines that the United States should . . . take over any project . . . the Commission shall not issue a new license *to the original licensee or to a new licensee* but shall submit its recommendation to Congress . . . [Emphasis added].

Similarly, their reliance on Section 15(b) is improper because that provision also was enacted in 1968 and uses "new licensee" in the same context as Section 15(a).

[30] They argue that the public power interests construe to "new licensees" as having no significance, so that the phrase would read,

When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), n. 29, at 184.

THE 1968 AMENDMENTS TO THE FEDERAL POWER ACT

The FPA contains no provisions for renewing or extending licenses. As enacted in 1920 and reenacted in 1935, Section 14 gives the United States "upon not less than two years' notice in writing from the commission . . . the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects . . ." upon the payment of the net investment plus severance damages. If the United States does not do so, Section 15 authorizes the Commission to issue a new or successor license. And if the Commission does not do so "upon reasonable terms", Section 15 directs the Commission to issue annual licenses to the "then licensee" under the terms and conditions of the original or predecessor license "until the property is taken over or a new license is issued. . . ."

As a result of these provisions, a three-step takeover/relicensing procedure developed in the 1960's as the 50th anniversary of the FWPA and the reality of expiring licenses approached. First, the Commission submitted information on expiring licenses to Congress together with its recommendations regarding takeover. Second, Congress considered and acted on the recommendations. And

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"in issuing licenses under section 15 hereof." The public power interests reply that "to new licensees under section 15" refers to long-term licenses under that provision, as distinguished from annual licenses thereunder which can be issued to the "then licensee". They say that annual licenses possibly could have been confused with long-term licenses if "to new licensees" had been omitted from Section 7(a).

third, since no projects were taken over, the Commission considered and acted on the applications for new, or successor, licenses.

In 1967 the Commission proposed certain amendments to the FPA that would eliminate that three-step procedure and permit it to consider takeover recommendations and relicensing applications at the same time. The proposal was unopposed and, as enacted in 1968, added Sections 7(c), 14(b) and 15(b) to the FPA.[31] Under the new procedure, any Federal department or agency may recommend during the course of any relicensing proceeding that the United States take over the project or projects in question, and if the Commission agrees, it is required to submit its recommendation to Congress and may not issue a new license. But if the Commission does not agree, it is required, upon request by a Federal agency recommending takeover, to stay the effective date of its order issuing a new license to give Congress two years to consider takeover. Thus, Congress would consider only projects recommended for takeover, rather than all projects.

During the course of the hearings on the 1968 amendments the Commission's General Counsel testified with respect to the House and Senate bills (Hearings on H.R. 12698 and H.R. 12699, at 32),

> They are procedural bills designed solely to permit the recapture and relicensing determinations to be made efficiently and in harmony with the purpose underlying the limited term license. There has been no attempt to modify the substantive standards which the Commission is required to apply in determining

[31] The Act (Public Law 90-451) recited that its purpose was "to clarify the manner in which the licensing authority of the Commission and the right of the United States to take over a project or projects upon or after the expiration of any license shall be exercised." One substantive provision, that would have permitted the Commission to amend licenses to impose "further reasonable requirements", was omitted from the final bill.

> whether or not to recommend recapture and in passing upon relicensing proposals.

and, at 34,

> Another issue which has received considerable attention in the Senate hearings relates to the substantive question of the relative rights of the existing licensee and other would-be applicants in a relicensing proceeding before the Commission in the event Congress does not act to recapture a project. The Commission bill does not attempt to deal with this question.

The report of the House Committee on Interstate and Foreign Commerce on the amendment bill (House Report No. 1643, 90th Congress, 2d Session) did not address the municipal preference of Section 7(a). The report of the Senate Committee on Commerce on the amendment bill (Senate Report No. 1338, 90th Congress, 2d Session), on the other hand, did address that preference, as follows:

> During the course of the hearings on S. 2445, your committee heard considerable testimony on the question of whether the preference which is extended under subsection 7(a) of the Federal Power Act to States and municipalities in their application for a license for a new hydroelectric power project also extends to those cases where an existing private power hydroelectric project license has expired, and in addition to the original licensee's application for a new license, a State or municipality also files an application for the new license.
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> "Your committee was impressed by the testimony of the Federal Power Commission concerning its interpretation of the law in this area and the policy it now applies to implement the law.[32] In his letter of

[32] Contrary to the committee's expressed belief that the Commission's General Counsel's interpretation was then being applied as a work practice, the Commission is only now addressing the applicability of the municipal preference to relicensings for the first time in a proceeding under the FPA.

August 28, 1967, to the Vice President, submitting the proposal which became S. 2445, Chairman Lee White stated:

"Under section 7(a) of the Federal Power Act the Commission is instructed to give preference to applications by States and municipalities in issuing licenses to new licensees under section 15. Our General Counsel has advised us that this preference applies only after it has determined that the original licensee should not receive a new license. In those instances where the origianl licensee and another applicant seek a new license for the same project, the Commission believes that the new license is to be issued to whichever applicant can best meet the standards of the act. In those rare cases where the two applicants are equally matched the Commission believes that the new license should be issued to the original licensee so long as he can meet the standards of the act at least as well as the other applicant."

And further on in the same letter he said:

["Finally we have considered establishing an additional preference for the original licensee to apply in cases where a rival applicant could slightly better achieve the objective of the Act.] [33] We believe that all other things being equal, continuity in ownership and management is a value in itself which should be recognized and is to be recognized under the present statute. However, when another applicant demonstrates a superior ability to meet the congressional objectives, in our view no preference should assure the position of the original licensee."

If the original licensee files an application for a new license, unless the Commission finds that the

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[33] The bracketed sentence was in Chairman White's letter and is added back to restore the context.

project, with such modifications and conditions as it may prescribe, would not be best adapted to a comprehensive plan for improving or developing the waterway involved, the Commission then would issue to the original licensee a new license containing such modifications and conditions as it may find appropriate or necessary.

Continuity of ownership and management is desirable to avoid possible interruption of service resulting from the severance of a project from an integrated system, the upsetting of existing tax patterns which are a substantial source of revenue to many communities, the dislocation of jobs, and other possible adverse results. Granting of the license to a different licensee can only be justified when the existing licensee is unable or unwilling to carry out whatever modifications are found to be necessary for comprehensive development of the waterway or to meet the standards of the act.

Section 14 of the existing act expressly reserves the rights of the States and municipalities to take over any project by condemnation proceedings upon payment of just compensation. States and municipalities, therefore, have a priority which can be exercised by eminent domain before, during, or after relicensing. On the other hand, if the State or municipality does not exercise this priority, and the existing licensee is willing and able to develop, redevelop, and operate the project so that it would be best adapted to a comprehensive plan for improving or developing the waterway involved, the new license should be issued to the existing licensee.

Chairman Magnuson and Senators Hart, Brewster and Moss expressed their supplemental (minority) views, as follows:

S. 2445, introduced at the request of the Federal Power Commission, was designed merely to clarify

the procedure to be followed upon the expiration of existing hydroelectric power project licenses. No substantial changes in the Commission's licensing authority were intended in this amendment to the Federal Power Act.

For this reason, no provision was made in the bill for priorities or preferential rights on relicensing, and it is our opinion that the committee report should remain silent on this issue.

Under section 7(a) of the act, the Commission is instructed to give preference to applications by States and municipalities in issuing original licenses and "in issuing licenses to new licensees under section 15," the relicensing provision. It is not clear what this language means and *it has never received either formal administrative or judicial interpretation.* The publicly owned utilities interpret the provision to require application of their preference on relicensing, arguing that when an original license expires, a new license must necessarily be issue to a "new licensee." The privately owned companies disagree, arguing that if the original licensee is seeking relicense, he is not a "new licensee" and the preference should not apply. In fact, the privately owned companies content [sic., contend] that a preference should lie with the existing licensee. In addition, the rural cooperatives have requested a statutory amendment providing them with the same preference as public agencies, to apply on relicensing as well as original licensing [Emphasis added].

Succinctly stated, the issues are (a) whether the statutory preference for public development of our water resources applies on relicensing; (b) whether the public agency preference should be extended to rural cooperatives; and (c) whether the existing licensee should have a preference or priority on relicensing.

No attempt should be made to resolve these difficult questions without careful research and study and a clear understanding of the implications of any decision reached. The suggestions of the various parties go beyond the scope of the bill as presented to the Congress and this committee.

Furthermore, continuity of ownership and management, tax revenues, and employment opportunities, factors mentioned in the majority report, are not the criteria which the act directs the Commission to consider in the issuance of licenses. Similarly, nothing in the act indicates that it is in accord with the majority's view that granting of a license to a new licensee "can only be justified when the existing licensee is unable or unwilling" to carry out modification of the project. The standard to be utilized in the issuance of both licenses and relicenses is found in section 10(a) of the Federal Power Act.

S. 2445 is primarily a procedural, housekeeping bill providing congressional direction for the relicensing process. The legal, constitutional, and policy questions raised in the majority report seriously change the tenor and import of this bill. Ony [sic., Only] administrative changes should be considered in this bill, and substantive changes in the Power Act, is [sic., if] needed or desired, should be considered at a separate time.

For these reasons, we cannot subscribe to that portion of the report which relates to section 7(a) of the Federal Power Act.

The private power interests contend that the 1968 amendment of Section 7 was the reenactment of that provision and that Congress, by amending the FPA in 1968 with knowledge of the Commission's interpretation of the municipal preference, thereby approved the Commission's interpretation. They contend, additionally, that that inter-

pretation cannot be changed now by Commission action. And they cite, among other decisions, *Kay* v. *Federal Communications Commission*, 443 F.2d 638 (D.C. Cir., 1970), at 646,

> [A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has Congressional approval.

PG&E, in its initial brief at 22, claims that the facts involved in the enactment of the 1968 amendments are essentially indistinguishable from the facts considered by the court in *Association of American Railroads* v. *Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1970), which is one of the leading cases on the subject. Santa Clara responds to that claim at 70 of its reply brief, saying that PG&E's claim is not supported by the decision. This "doctrine of reenactment" is discussed *infra*.

The public power interests and the staff counsel take the position that the 1968 enactment of Section 7(c), pertaining to the procedures interrelating relicensing and takeover, was not a reenactment of Section 7(a), pertaining to the standards for selecting applicants, and consequently the "doctrine of reenactment" does not apply. They contend that there is no long-standing Commission application and consequent interpretation of the municipal preference in rulemaking or contested adjudicatory proceedings, as is required under the doctrine, and as proved by the fact that the Commission initiated this declaratory order proceeding for the purpose of developing a working interpretation of that preference. And they contend that while one committee report seemed to approve the Commission's General Counsel's interpretation, there is no proof that Congress as a body approved that interpretation.

LICENSE TRANSFEREES AS "ORIGINAL LICENSEES"

While all of the parties do not address the second issue for declaratory order specified in the order of May 3, 1979, all who address it except the staff counsel and Santa Clara appear to agree with one another that an assignee or successor licensee is an "original licensee" within the meaning of Section 15(a).[34] They cite Section 8 of the FWPA, which is now Section 8 of the FPA, as follows:

> That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the Commission, and any successor or assign of the rights of such licensee, whether by voluntary transfer, judicial sale, foreclosure sale, or otherwise, shall be subject to all of the conditions of the license under which such rights are held by such licensee and also subject to all the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee hereunder: *Provided*, That a mortgage or trust deed or judicial sales made thereunder or under tax sales shall not be deemed voluntary transfers within the meaning of this section.

The Hydro Group contends, in this connection, that the clear purpose of Section 8 is to place transferees in the shoes of original licensee. They argue: (1) that the Commission can issue new licenses under Section 15 only to "new licensees" and "original licensees", (2) that "new licensees" and "original licensees" are mutually exclusive, (3) that transferees are in possession of project works while "new licensees" are not, and (4) that if transferees are not "original licensees" the Commission has no

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[34] The Commission staff counsel says that the issue is moot if it is found that the municipal preference is applicable to relicensings against original licensees that are not States or municipalities.

authority to issue new licenses to them, which would produce an absurd result. And PG&E argues that the statutory language that

> . . . any successor or assign . . . shall be . . . subject to *all* the provisions and conditions of this Act to the same extent as though such successor or assign were the original licensee [Emphasis added] . . .

leaves no doubt that the treatment prescribed for "assigns" carriers through "all the provisions" of the FPA, including Section 15.

Santa Clara contends, on the other hand, that PG&E is not the "original licensee" (in the sense of the first licensee) of the Mokelumne River Project because it is a transferee from the "original licensee",[35] stating,

> [S]ince the Section 15(a) term "then licensee" encompasses both an "original licensee" and a "present licensee", and PGandE is clearly the "present licensee", PGandE cannot even claim the benefit of any possible 15(a)-7(a) exclusion of "original licensees" from the municipal preference. As something different from the "original licensee", PGandE would, without question, fall literally within the 7(a) municipal preference in renewal contests: ". . . in issuing licenses to new licensees."

APPLICABILITY OF SECTION 7(a) TO RELICENSINGS

Plain Meaning

We turn first to the question of the plain meaning of "new licensees" because we are admonished by some of

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[35] PG&E was the first licensee of several projects that were consolidated under the docket number, or project number, of the Mokelumne River Project, as to which PG&E was a transferee licensee. As a result of the consolidation, PG&E became both a transferee license and the first licensee of portions of that project as then licensed.

the parties not to look at the legislative history if that term has a plain meaning in Section 7(a).

In *Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976), the Supreme Court reversed the Tenth Circuit (507 F.2d 743 (1974)) for its failure to consider the legislative history of the term "pollutant" as used in the Federal Water Pollution Control Act (FWPCA), stating; at 9,

> To the extent that the Court of Appeals excluded reference to the legislative history of the FWPCA in discerning its meaning, the court was in error. As we have noted before: "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" [Citations omitted.]

Two years later, however, in *Tennessee Valley Authority* v. *Hill*, 437 U.S. 153 (1978), the Supreme Court said, at 184, n. 5,

> When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning. [Citation omitted.] Here it is not necessary to look beyond the words of the statute. *We have undertaken such an analysis* only to meet Mr. Justice Powell's suggestion that the "absurd" result reached in this case . . . is not in accord with congressional intent. [Emphasis added.]

Coming closer to "home", the District of Columbia Circuit Court held in *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, 489 F.2d 1207 (1973), that steam plants are not licensable as such under the FPA, stating, at 124 (footnotes omitted),

> It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. . . .

Under the "ordinary man" or "plain meaning" canon of statutory construction, petitioners argue, the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.

In answering a similar argument, the Second Circuit has said:

> We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [NLRB v. Federbush Co., Inc., 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history.

Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose. The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only where the words of the statute are ambiguous but also "when the literal words would bring about an end completely at variance with the purpose of the statute." [Emphasis added.]

Turning first to the words chosen by Congress, the fact that the public power interests have been able to provide one reasonable interpretation to "new licensees" without reference to extrinsic construction aids, chiefly through its context in Section 7(a), and the further fact that the private power interests attribute a different meaning by following the reference in Section 7(a) to Section 15 of the FWPA, which is Section 15(a) of the FPA, suggest that there is a sufficient ambiguity as to the meaning of "new licensees" that it would be appropriate to turn to the legislative history.

But if that suggestion is not enough, we observe that the public power interests and the Commission staff counsel have failed to challenge a hypothesis that is implicit in the position of the private power interests—that the term "new licensee", which is used three times in Section 15(a), has a meaning that can be carried forward into Section 7(a). And we conclude that it has no such meaning because the contexts of usage are different.

Just as the private power interests follow the reference in Section 7(a) to Section 15(a), our analysis follows the reference in Section 15(a) to Section 14 of the FWPA, which is Section 14(a) of FPA. That provision is concerned with the subject of takeover upon or after the expiration of any license, and uses the term "licensee" eight times to refer to the citizen, corporation, State or municipality that is in possession of a project under an expiring or expired long-term license.[36] Section 14(a) also uses the term "United States" three times to refer to the government that must pay the net investment plus severance damages to the "licensee", and must assume certain contracts, before taking possession.

Section 15(a), on the other hand, is concerned with the subject of successor licenses if the "United States" does not, at the expiration of the "original license",[37] take over

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[36] If a "licensee" is in possession under an expired long-term license, it would also be in possession under a current annual license since the FPA is designed to avoid gaps between long-term licenses.

[37] If the term "original license" as used in its first appearance in Section 15(a) does not refer to the expiring or last expired long-term license, which might or might not be the first license, then the Commission would have authority under Section 15(a) to relicense project works only once. A literal reading of "original license" to mean the first license in all cases would produce an absurd result that would bring about an end completely at variance with the purpose of the FPA.

Furthermore, it is appropriate to construe the words "original" and "new" consistently within Section 15(a) to have their same respective meanings preceding both "license" and "licensee".

the project works of the "licensee"—using the term "licensee" in the same context as in Section 14(a) to mean the citizen, etc., in possession under an expiring or expired long-term license.

Thereafter, Section 15(a) uses the term "original licensee" (instead of "licensee" as in Section 14(a)) two times to refer to the citizen, etc., that is in possession under an expiring or expired long-term license, and not necessarily the first licensee. And it uses the term "new licensee" [38] three times to refer to the citizen, corporation, State or municipality (in lieu of the "United States" in Section 14(a)) that must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, before taking possession.

In other words, "original licensee" and "new licensee" are used in Section 15(a) as correlative terms to describe a predecessor/successor relationship in a context of successive license terms.[39] Section 15(a) authorizes the Commission to issue successor licenses to any citizen, etc., eligible for an initial license.[40] And it is necessary to dis-

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[38] "New licensee" is an unfortunate choice of terms because an applicant for a successor license (that is not an "original licensee" in possession) does not become a licensee until the license is accepted *after issuance.*

[39] This interpretation disposes of the second issue raised in the Commission's order of May 3, 1979. An "original" licensee in the context of Section 15(a) is a predecessor licensee in possession, which status has no relationship to the question of whether that licensee is also the "original" or first (or initial) licensee in the context of Section 8, or an assignee or successor of the first (or initial) licensee.

[40] The municipal preference issue in this proceeding pertaining to the meaning of "new licensees" in Section 7(a) is not the only major issue spawned by the Pinchot/Lenroot/Jones amendment. It has been argued that in view of the words in Section 7(a) "in issuing licenses . . . under section 15 hereof", the Commission's authority in issuing successor licenses is limited to Section 15(a), exclud-

tinguish between the "original licensee" in possession and a "new licensee" not yet in possession because a successor licensee must pay the net investment plus severance damages to the "original licensee", and must assume certain contracts, *only* if that successor is not also the predecessor licensee.[41]

Finally, Section 15(a) provides that if the United States does not take over the project works and the Commission does not issue a successor long-term license, then the Commission shall issue annual licenses to the "then licensee"—

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ing Section 4(e) pertaining to the issuance of licenses generally. Accordingly, it has also been argued that the Commission doesn't have to find under Section 4(e) that a successor license will not interfere or be inconsistent with the purpose for which a reservation was created or acquired, and that a successor license is not subject to and need not contain the conditions that a departmental Secretary deems necessary for the adequate protection and utilization of the reservation. The issue was addressed in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, wherein the Commission indicated (mimeo. at 98) that Section 15(a) does not specify (1) *to whom* successor licenses may be issued (to citizens of the United States, associations of such citizens, certain corporations, States and municipalities), (2) *for what purposes* they may be issued (for constructing, operating and maintaining project works, or utilizing surplus water or water power) and (3) *on what jurisdictional bases* they may be issued (bodies of water over which Congress has jurisdiction, public lands and reservations of the United States, and Government dams), all of which are supplied by Section 4(e). The issue was not reached in Opinion No. 36 because the successor licensing therein was treated partly as an initial licensing and partly as a relicensing.

[41] Section 22, which is concerned with certain contracts for the sale and delivery of power, uses the term "licensee" once in the same context as in Section 14(a) to mean the citizen, etc., in possession, in a context in which it is not necessary to distinguish between the citizen, etc., not yet in possession. It also uses the correlative terms "original licensee" and "new licensee" one each in the same context as in Section 15(a) when it is necessary to make such a distinction, for a successor licensee must assume certain contracts only if that successor is not also the predecessor licensee.

which is almost but not quite the same as the "licensee" in possession in Section 14(a) and at the beginning of Section 15(a), and the "original licensee" in possession thereafter in Section 15(a). Since the recipient of an annual license must always be in possession, a "then licensee" differs from a "new licensee" conceptually in that there is no need to distinguish between a successor in possession from one not yet in possession. And since annual licenses may succeed predecessor annual licenses as well as long-term licenses, a "then licensee" differs from a "licensee" conceptually in that it includes a citizen, etc., in possession under an expiring or expired annual license.[42]

There are two places in the FPA at which the terms "original licensee" and "new licensee" are used separately and not correlatively. The term "original licensee" is used in Section 8, *supra*,[43] to mean the first or initial licensee in the context of a single license term. Although the words "or otherwise" in Section 8 are inclusive enough to cover a successor licensee in the context of successive license terms, the word "any successor or assign . . . shall be subject to all the conditions of *the license under which such rights are held*" (emphasis added) appear to limit the overall context to a single license term. In other words, a Section 8 "original licensee" is a first or initial licensee within a license term, whereas a Sections 15(a)/22 "original licensee" is a predecessor licensee as between two license terms. The term "original licensee", when

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[42] Consistent with the interpretation of the word "original" herein, in Opinion No. 36 (*Escondido Mutual Water Company*, Project No. 176), issued February 26, 1979, the Commission (mimeo, at 191) interpreted the term "original license" in the proviso of Section 15(a) as distinguishing the expiring license from a "new license", "and not as referring to the terms imposed by the expiring license when it was originally issued."

[43] Section 8 uses the term "such licensee" in two places without an antecedent reference to "such". Nonetheless, "such licensee", like "original licensee", appears in context to refer to the first licensee.

used alone in Section 8, does not have the same meaning as the same term when used in correlation with "new licensee" in Sections 15(a) and 22. And since it doesn't, there is no reason to require the term "new licensees", when used alone in Section 7(a), to have the same meaning as the term "new licensee" when used in correlation with "original licensee" in Sections 15(a) and 22.

Sections 15(a) and 22 are concerned with predecessor/successor relationships in a context of successive license terms. Section 7(a), as the Hydro Group concedes, is concerned with the standards to be applied by the Commission in choosing among applicants.[44] It is concerned with choosing applicants as licensees for the forthcoming license term, whether that is the initial term or a successor term. But like Section 8, and unlike Sections 15(a) and 22, it is concerned with the single license term under consideration. Accordingly, we conclude on the basis of the intrinsic evidence within the statute that Section 7(a) "new licensees" are those who may be chosen (i.e., the applicants) for the new or forthcoming license term, which status has no

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[44] In certain places in the FPA the reference to the issuance of licenses is troublesome if restricted literally to the ministerial act of issuance. In Opinion No. 36-A (*Escondido Mutual Water Company, et al.*, Project No. 176), for example, we said, at 21, that the reference in Section 4(e) to the issuance of licenses "within any reservation" would not be construed literally to refer to a Commission vote upon the issuance of a license when the members of the Commission are physically within a reservation. So, too, the reference in Section 7(a) to "issuing licenses" should not be restricted to the ministerial act of issuance. Since the Commission is required to make certain findings either before or in conjunction with its vote on the issuance of a license, the reference in Section 7(a) to "issuing licenses" should include the overall consideration of applications for licenses. And in that context, the more-inclusive phrase "in issuing licenses to new licensees" would mean, simply, "in considering applications of new licensees", or, as Santa Clara argues (*supra*, at note 15), "in determining whether to issue licenses to new licensees". See, also, note 38, *supra*, which indicates that "new licensee" is an unfortunate choice of terms.

necessary relationship to the question of whether they are "new" or successor licensees as between two license terms in the context of Section 15(a). In any event, there should be sufficient doubt as to whether "new licensees" in the context of Section 7(a) are identical to a "new licensee" in the context of Section 15(a), to merit a look at the legislative history.[45]

Legislative History

Having concluded that a Section 8 "original licensee" may not be the same as a Sections 15(a)/22 "original licensee",[46] we turn to the legislative history to ascertain the identities of the Section 7(a) "new licensees". There are two principal aspects to scrutinize—the introduction of the Administration Bill, and the Pinchot/Lenroot/Jones amendment.

Upon its introduction, the Administration Bill provided in the first paragraph of Section 7, in pertinent part,

> That in issuing licenses hereunder, the commission may in its discretion give preference to applications for licenses by States and municipalities. . . .

Like Section 4(d) of the FWPA authorizing the Commission generally to issue licenses (which is now Section 4(e) of the FPA), there were no words expressly including or excluding successor licenses. The claims of the private power interests that the reference to "plans" for "developing" power limited the preference to initial licenses, are

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[45] Although Section 7(a) is concerned with choosing applicants as licensees, we note that the Commission is directed to give preference to applications (documents) of States and municipalities, and authorized (not consistently) to give preference "as between other applicants". This is a further example of non-consistent language noted in other parts of this Opinion and order.

[46] They are the same only when the "original" or first licensee under a license retains its status of being the licensee through the expiration of that license, thus becoming the "original" or predecessor licensee of the successor license.

totally unpersuasive. The plans were to be adapted "to conserve and utilize . . . navigation and water resources", which includes operation as well as construction, and, therefore, refers implicitly to successor licenses as well as initial licenses. Considering that "in issuing licenses", without limiting words, refers to all licenses, and considering the intent concerning preferences that was expressed in Merrill's memorandum of October 31, 1917, it appears that the municipal preference in Section 7 of the Administration Bill clearly applied to the issuance of all successor licenses.

After the introduction of the Administration Bill, the first paragraph of Section 7 was amended, first, so that the municipal preference would apply to the issuance of preliminary permits (which can happen, if at all, only prior to the issuance of an initial license), and second, so that the municipal preference would *not* apply to the issuance of initial licenses associated with outstanding preliminary permits. Considering that there were no words expressly including successor licenses, and that words were added to include preliminary permits and exclude initial licenses associated with outstanding preliminary permits, the application of the municipal preference to successor licenses became obscured through the successive amendments.

Eventually, the Pinchot/Lenroot/Jones amendment changed the pertinent language to read:

> That in issuing preliminary permits hereunder or licenses where no preliminary permit has been issued *and in issuing licenses to new licensees under section 15 hereof* the commission shall give preference to applications therefor by States and municipalities . . .

That amendment changed the context of the first 15 words significantly. Immediately prior to the amendment there still were no words expressly concerned with (either including or excluding) the issuance of successor licenses

and consequently, the words of the Administration Bill "in issuing . . . licenses" continued to refer to all licenses. The words had been amended, however, to say "in issuing . . . licenses where no preliminary permit has been issued", thus excluding *initial* licenses that were associated with outstanding preliminary permits. But, as in the Administration Bill, they continued to apply silently to all successor licenses.

The Pinchot/Lenroot/Jones amendment introduced for the first time words that were expressly concerned with successor licenses. As a result, the first 15 words were limited in their application to preliminary permits and *initial* licences, and the 11 words that were added applied exclusively to successor licenses. The official explanation, per Senate Report No. 180 (66th Congress, 1st Session), described this amendment as one of a general body of amendments that were "of a minor character" and made "more clear and certain the meaning of the House provisions."

The interpretation of the public power interests and the Commission staff counsel that "new licensees" are any licensees under a successor license, is the *only* interpretation that is consistent with the official explanation. The words were added to express the same municipal preference with respect to successor licenses that was in Section 7 silently immediately before its amendment. The narrower interpretation of the private power interests that "new licensees" are limited to those not in possession, would have resulted in a substantive change and presumably would have been described as such in Senate Report No. 180. And the alternative justification of the private interests that the amendment added a limited municipal preference on relicensing where none had existed before, also would have resulted in a substantive change and, additionally, runs counter to Merrill's memorandum of October 31, 1917, and other indicia of the existence of the preference.

Finally, the interpretation of the public power interests is consistent not only with the official explanation of the Pinchot/Lenroot/Jones amendment, but also with the Merrill/Lee explanation of the FWPA as it emerged from the committee of conference and was passed by Congress and signed by President Wilson.

We turn, next, to the effects of interpreting "new licensees" one way or the other. Section 7(a) identifies three areas of potential competition for preliminary permits and licenses, as follows:

1. Preliminary permits

2. Initial licenses not associated with outstanding preliminary permits

3. Successor licenses

The three areas cover the entire possible field of competition with the exception of initial licenses associated with outstanding preliminary permits. That area was intentionally omitted because preliminary permits are issued for the sole purpose of maintaining priority of application for licenses, and because permittees are to receive such priority if any license is issued and if they comply with the terms of their permits.

Section 7(a) also describes two preferences, or standards, to be applied by the Commission in choosing among competing applicants in the foregoing three areas of competition. If the competitors are States or municipalities, the Commission is directed to give them preference over citizens and corporations if their plans are "equally well adapted". But "as between other applicants", or, stated another way, as among citizens and corporations *inter se* when the competitors are not States and municipalities, the Commission may give preference to the applicant with the "best adapted" plans.

The two preferences cover all of the possible combinations of competitors with the possible exception of compe-

tition among States and municipalities *inter se*. It could be argued that it was not necessary to cover such competition since the political process could be expected to resolve questions pertaining to the choice of the government entities that would develop water power on behalf of the public.[47] But we believe that there is a silent prepositional phrase in the municipal preference, as follows:

> . . . the Commission shall give preference to applications therefor by States and municipalities *over applications by citizens and corporations* . . .

With the addition of that phrase, we construe the second preference "as between other applicants" to mean "as between applicants other than States and municipalities, on the one hand, and citizens and corporations, on the other hand". With that meaning, the second preference would be applicable to competition among States and municipalities *inter se*, as well as among citizens and corporations *inter se*. The first, or municipal, preference would continue to be applicable to competition between States and municipalities, and citizens or corporations, completing the coverage of all the possible combinations of competitors.

If "new licensees" are any licensees under a successor license, as the public power interests and the Commission staff counsel contend, the application of the two preferences to the three areas of competition will provide a standard for the Commission to apply in every possible permitting and licensing situation, with the exception of the one area of competition intentionally excluded. The Commission can apply either the "equally well adapted" or the "best adapted" standard to the issuance of all (a) preliminary permits, (b) initial licenses not associated with outstanding preliminary permits, and (c) successor licenses, depending upon whether any applicants are States

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[47] Whatever the expectation of Congress, we have experienced competitive licensings between States and municipalities *inter se*.

or municipalities. And there will be no gaps in any situation, except as intended.

The private power interests' position, on the other hand, that "new licensees" exclude "original licensees", will produce absurd results as well as a regulatory gap.

Counsel for the Hydro Group took the position in the oral argument (TR. 89-90) that under their view that "new licensees" exclude "original licensees", State and municipal "original licensees" *in possession* would not have a relicensing preference against citizen or corporation applicants *not in possession*. Since States and municipalities have an undisputed preference to preliminary permits and initial licenses, it is absurd to believe that Congress did not also give them a preference to successor licenses in those circumstances.

The private power interests also say that the municipal preference doesn't apply unless the "original licensee" in possession chooses not to file an application for a successor license—in which case a State or municipality not in possession could compete against a citizen or corporation not in possession, resulting in a routine application of the "equally well adapted" standard. It is even more absurd to believe that Congress gave States and municipalities *not in possession* a preference against citizens and corporations not in possession, without also giving States and municipalities *in possession* the same preference against citizens and corporations not in possession.

The private power interests say, additionally, that if the "original licensee" in possession *does* file an application for a successor license, the municipal preference doesn't apply until the Commission first decides not to issue a successor license to the "original licensee". The problems with that position are threefold.

First, a State or municipality not in possession would nonetheless be competing against the "original licensee" in

possession within a two-step relicensing procedure, one step to decide whether to issue the successor license to the "original licensee" in possession, and if not, the other to choose among applicants not in possession. There is in fact no such two-step procedure.[48]

Second, competition between a citizen or corporation in possession and a State or municipality not in possession clearly is not covered by the second preference of Section 7(a).[49] If it is not also covered by the municipal preference, as the private power interests contend, then the Commission would have no standard to apply in deciding whether to issue a successor license to the "original licensee" in possession.

And third, a decision to issue a successor license to the "original license" in possession would, in effect, provide a relicensing preference for the "original licensee", contrary to the position of counsel for the Hydro Group in the oral argument. A relicensing preference in favor of an "original licensee" in possession is irreconcilable with

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[48] While the priavte power interests rely on the 1968 amendments to the FPA because of Chairman White's statement to Congress, the fact is that those amendments were enacted to eliminate a three-step relicensing/takeover procedure, and the resulting procedure described in the legislative history of those amendments does not indicate that there would be two steps in relicensing. Indeed, Section 14(b), which was enacted in 1968, states that,

> the Commission shall entertain applications [plural] for a new license and decide them in a relicensing proceeding [singular] pursuant to the provisions of section 15. . . .

suggesting that all pending applications are to be decided at the same time.

[49] If the second preference said, "in other situations," it would have been a catch-all. But the words, "as between other applicants," refer back to the combinations of competitors (State/municipal v. citizen/corporation) covered by the municipal preference, as distinguished from the areas of competition (permits and licenses) to which both preferences are applied.

the absence of statutory words or legislative history indicating that such a preference exists, and, particularly, with the private power interests' emphasis on the "plain meaning" of the statute.

1968 Amendments

Having determined that the interpretation of the public power interests and the Commission staff counsel is supported by the legislative history, and that the interpretation of the private power interests produces absurd results and leaves a regulatory gap, we turn to the claim that Congress in 1968 precluded a subsequent change in the Commission's administrative interpretation favoring the private power interests.[50]

The private power interests would have us invoke a judicially-created doctrine that was called the "doctrine of reenactment" in *Association of American Railroads* v. *Interstate Commerce Commission*, 564 F.2d 486 (D.C. Cir., 1977), at 493, a leading case that applied the doctrine. As its name implies, invocation of the doctrine requires a threshold reenactment of a statutory provision which, in this case, is Section 7(a) of the FPA. Although the first paragraph of Section 7 of the FWPA was reenacted in 1935 as Section 7(a) of the FPA, the private power interests do not base their claim on that reenact-

[50] One of the most troublesome aspects of that interpretation, if not *the* most troublesome one, is that the General Counsel's rationale has not surfaced in this proceeding. As a result, we have no basis for judging the merits of, or being persuaded by, his interpretation, other than through the documents submitted to him, namely, (1) the legal memorandum transmitted to the General Counsel on behalf of some private power interests with the O'Kelly letter dated December 19, 1966, and (2) the Ely opinion letter to the American Public Power Association dated March 24, 1967. Copies of the foregoing documents were transmitted to the Commission as attachments to the Assistant General Counsel's memorandum dated March 28, 1967, which stated, simply, "Our view of the correct interpretation of section 7(a) . . . is similar to that contained in the O'Kelly memorandum."

ment and, in any event, the other requisites are not present with respect to that reenactment. They base their claim on the 1968 legislation amending Section 7 of the FPA to add Section 7(c), but not reenacting Section 7(a).

Under the "doctrine of reenactment", when Congress is made aware of an administrative interpretation of a statutory provision and gives an affirmative indication of an intent not to change the meaning of the provision, Congress thereby precludes a subsequent change in the administrative interpretation of that provision. In addition to the requisite reenactment, *Association of American Railroads* suggests, at 493, that the administrative interpretation should be a "longstanding and unquestioned interpretation" in the course of the work of an agency, which we would distinguish from an administrative interpretation recited to Congress at committee hearings. *Association of American Railroads* also suggests, at 493, not only that Congress must have expressed its satisfaction with the interpretation, but also must have "affirmatively concluded that it should not be changed for the time being".

Securities and Exchange Commission v. *Sloan*, 436 U.S. 103 (1978), is, perhaps the most recent Supreme Court decision on the "doctrine of reenactment". The Securities and Exchange Commission (SEC) had authority under the Securities and Exchange Act of 1934 to summarily suspend the trading of securities on national exchanges for a period of 10 days, and it consistently interpreted its authority as permitting trading suspensions for successive 10-day periods, resulting in some long suspensions. In 1964 Congress amended the Securities Exchange Act of 1934 to grant to SEC the same power to summarily deal with securities traded in the over-the-counter market as it already had to deal with securities on national exchanges, and in 1975 Congress further amended that Act to consolidate the two

resulting statutory provisions into one. The SEC informed Congress of its practice, in conjunction with the 1964 amendment, and the Senate Committee on Banking and Currency indicated in its report (Senate Report No. 379, 88th Congress, 1st Session) that it understood and did not disapprove the SEC's practice. Nonetheless, the Supreme Court struck down the practice and refused to apply the "doctrine of reenactment", stating, at 120, that the SEC made its practice known to at least one committee

> at a time when the attention of the committee and of the Congress was focused on issues [the expansion of powers over securities on national exchanges to securities traded over-the-counter] not directly related to the one presently before the Court. Although the section in question was re-enacted in 1964, and while it appears that the Committee Report did recognize and approve of the Commission's practice, this is scarcely the sort of congressional approval [that is required].
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> We are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents. That language in a Committee Report, without additional indication of more widespread congressional awareness, is simply not sufficient to invoke the presumption in a case such as this.

On the basis of the foregoing two decisions, among others not cited, we conclude that the private power interests' position is deficient in at least the following respects, any one of which is cause for declining to invoke the "doctrine of reenactment": (1) There was no reenactment of Section 7(a) after the Commission made its interpretation known to the committee. (2) The committee and Congress in 1968 were focusing on the non-controversial proposal procedures interrelating re-

licensing and takeover, not directly related to the controversial matter of the municipal preference. (3) Congress, and particularly the House (as distinguished from the Senate committee), was not shown to have been generally aware in 1968 of the Commission's interpretation. (4) The Commission's 1968 interpretation was not and is not a long-standing work practice.[51] Their position is so materially deficient in so many respects that we believe that it is appropriately characterized as a "red herring".

THE MUNICIPAL PREFERENCE IN RELICENSING DECISIONS

Section 7(a) of the FPA contains the standards to be applied by the Commission in choosing between or among applicants who are competing for preliminary permits and licenses for the same water resources. One standard is the "municipal" preference, which applies to competition between States or municipalities, on the one hand, and citizens or corporations, on the other.[52] If the Commission finds that the plans[53] of the State or municipal-

[51] The Commission's interpretation of the municipal preference in a relicensing context is inherently incapable of being a long-standing work practice because, as indicated, (1) the vast majority of initial licenses were issued for 50-year periods and did not begin to expire until the 1970's, and (2) this declaratory order proceeding was initiated for the express purpose of determining what the work practice will be.

[52] In the other, as between citizens and corporations, *inter se*, and States and municipalities, *inter se*, "the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans."

[53] The words "plan" and "plans" are used in several contexts in the FPA. The references in Section 7(a) to "equally well adapted" and "best adapted" "plans", as well as the reference in Section 10(a) to "comprehensive plan", run to the physical and nonphysical aspects of proposals for the development, conservation, and utiliza-

ity are "equally well adapted" as those of the citizen or corporation "to conserve and utilize in the public interest the water resources of the region", the Commission is directed by the statute to issue the preliminary permit or license to the State or municipality

Several parties, including the staff counsel, interpret the municipal preference of Section 7(a) to be a tie-breaking concept. We agree. Simply put, for a preliminary permit or an initial license, if the competing applications are equal with respect to advancing the public interest, the tie is broken by granting to the State or municipal applicant the statutory preference.[54] We have determined that this preference similarly holds in relicensing cases.

Congress intended that a State's or municipality's entitlement to preference should depend upon an evaluation by the Commission of public interest factors reflected in the competing plans before the Commission. As Congressmen Doremus and Raker said on the floor of the House (Dove, at 623-5):

> MR. DOREMUS. You have got to leave the discretion to determine whether the plans are adequate to serve the public interest with somebody, and necessarily it must be with the commission created in the bill.

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tion of regional water resources. The references in Sections 9(a) and 10(a), on the other hand, to maps, "plans", and specifications, run more narrowly to the physical and technical drawings, plans and specifications of a project.

[54] States and municipalities have a special opportunity under Section 7(a) to modify their plans to conform them to or make them better than any competing plans. Therefore, the municipal preference of Section 7(a) assures a State or municipality of being the successful applicant if it is able and willing to meet its competitors' plans on the merits. See 18 C.F.R. 433(g).

MR. RAKER. That being the case they should be allowed that discretion, and not be directed absolutely to grant the application.

MR. DOREMUS. They would still have the discretion to determine whether the plans submitted by the State or municipality were adapted to conserve [sic.] the public interests.

As discussed in previous sections, Congress envisioned probable private development of water power resources with ultimate public ownership possible.[55] The FWPA was enacted at a time when private interests were prepared to proceed to a much greater extent than the federal, State and local governments were, with financing and building hydropower projects. Congress concluded at the time the FWPA was passed that the public interest would best be served by rapid development of water power resources—by private or public entities—leaving the possibility of transfer of the hydro-facilities from private to public ownership at a later date should the Commission determine that the public interest could equally well be served by the public entities assuming ownership and the right to operate the facilities.

As early as 1908, President Roosevelt's landmark Rainy River veto message sought water power legislation that would leave "to future generations the power or authority to renew or extend the concession [license] in accordance with the conditions which may prevail at the time." And Merrill's memorandum of October 31, 1917, called for statutory "provisions that will leave the way open for future public ownership and operation if the experience of the next fifty years shall have established the wisdom of such a policy."

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[55] Senate Report No. 180, 66th Congress, 1st Session, quoted on page 27.

Merrill's proposal for a purely discretionary municipal preference [56] was modified in its movement through Congress into a preference that is mandatory should the Commission, in the exercise of its judgment, determine, in the words of Congressman Doremus, that "the plans are adequate *to serve the public interest*". [Emphasis added.]

Congress in 1920 was focussing on our nation's water power sites and equated the "public interest" with the prompt development of those sites. But Congress provided for the possibility of eventual public ownership even where the private interests undertook the responsibility for that development. The possibility was made dependent upon an evaluation by the Commission, at the time a license expires, of how the public interest would best be served by choosing among the various alternatives.

In sum, the Commission finds and hereby declares that the statutory scheme of the FPA is one in which a municipal or State applicant competing for a successor license against a citizen or corporate applicant is entitled by Section 7(a) to a preference if the Commission finds that the plans of the State or municipality are, in the words of Section 7(a),

> equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region . . .

Thus, in determining which competing applicant will receive a successor license, it is important to look not only at the "tie-breaker rule", but also to how the Commission will determine whether the plans are "equally well adapted". Put differently, whether there is a tie to

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[56] See the first paragraph of Section 7 of the Administration Bill, quoted on page 20.

be broken by municipal preference will depend upon the factors that the Commission takes into account to determine how well each of the competing plans would conserve and utilize the water resources of the region in the public interest.

The Commission does not have before it a record upon which a definitive statement can be made as to what showings should and must be made by the applicants in seeking to demonstrate how their plans compare. However, the record in this proceeding, the language of the statute itself, and the pertinent legislative history provide a basis for some generalizations about the public interest determination.

First, we believe the statute contemplates a broad assessment, evaluating both physical and nonphysical considerations when the public interest is assessed. Congress did not direct the Commission, in choosing among applicants, to limit its focus merely to plans in the physical or technical sense [57] to make beneficial public use of our nation's waterways. All licensed water power projects are required by Section 10(a) [58] to be best adapted physically and technically to utilize our nation's water re-

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[57] See Footnote 53.

[58] Section 10 provides, in pertinent part,

> All licenses issued under this Part shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public use, including recreational purposes; *and if necessary in order to secure such plan the Commission shall have the authority to require the modification of any project and of the plans and specifications of the project works before approval.* [Emphasis added.]

sources for the benefit of the public and, to the extent that they also conserve those resources, to do so for the benefit of the public. We are specifically authorized by Section 10(a) to require modifications to secure plans (in the physical or technical sense) that will be best adapted to a comprehensive plan (in the nonphysical as well as physical sense) for beneficial public uses. Thus, a project must be "best adapted", physically and technically, to beneficial public uses no matter which applicant we select.

During the oral argument, the Commission staff counsel suggested (Tr. 146) that our assessment of the "public interest" should be as broad as the commerce clause of the Constitution, and the general counsel of the American Public Power Association expressed his agreement (Tr. 187). Without adopting that particular interpretation here, we agree with the characterization expressed by the attorney for Utah Power and Light Company (Tr. 190) that our decision ought to take into account "the public interest in its broadest sense."

To evaluate the public benefits that would attend a relicensing, necessitates consideration of physical and technical factors as well as consideration of broader social impacts such as economic costs and benefits, the distribution of the benefits of hydropower and similar pertinent potential impacts. All of these would seem to play a role in the Commission's determination as to whether plans are equally well adapted.

Second, we believe that Congress did not intend the "public interest" to be static or frozen as of 1920. To the contrary, the legislative history of the FWPA shows that one of the reasons why Congress rejected perpetual licenses was to reserve for future generations the decisions as to which segments of the public would receive the benefits of our nation's water power resources. We believe that the "public interest" will vary with the circumstances and needs of the time period in which it is considered.

Third, public interest implications of competition in relicensing decisions can be even more complex and complicated than for initial licenses. When issuing *initial* licenses for unconstructed projects, we are permitting the utilization of then unused or underused water resources. Our choice between public and private applicants for initial licenses for unconstructed projects results in allocating the benefits or relatively inexpensive renewable sources of energy to either a segment of the public associated with the public applicant, or the private applicant or a segment of the public associated with it, none of whom are then receiving those benefits. But our choice between public and private applicants for *successor* licenses may result in reallocating the benefits of water power resources then in use from the private applicant, or a segment of the public associated with it, to the public entity and the segment of the public associated with the public entity. Moreover, transfer itself may have some effects, possibly disruptive, which are not present with initial licenses.

Fourth, our relicensing decisions may have important implications for the concentration and distribution of the benefits of hydropower, and it is important to keep in mind that FWPA was an outgrowth of a widespread belief—and an associated political movement—that had a basic tenet that the benefits of hydropower should be spread widely. A basic goal of the FPA is to assure that hydropower benefits are enjoyed by as much of the public as possible.

As previously noted, it will be necessary to develop the information on which to decide whether Bountiful, Santa Clara and other municipalities are entitled to a preference, in competing for a successor license, and it is important that the Commission be provided with an adequate basis upon which to examine broad public interest considerations.

Parties are encouraged to address such additional areas of consideration as they contend are pertinent to our

selection of licensees for particular successor licenses. We emphasize, in this connection, that the "public interest" standard of Section 7(a) has never been litigated in court and has been addressed in only a few Commission decisions.[59] It would, therefore, be premature to address the applicability, relevancy and materiality of particular areas of consideration. We would expect such factors to vary from case to case.

In the final analysis, it is left to the Commission to determine the "public interest" in the light of the facts and contentions in each particular application. The processing and consideration of the pending applications in which States and municipalities, and citizens or corporations, have requested successor licenses for the same water resources should go forward in the light of this declaratory order.

Finally, the Commission's Opinion Nos. 36, and 36A (*Escondido Mutual Water Company, et al.*, Project No. 176), involving a successor license and discussed briefly in Footnote 10, are subject to a pending appeal.

By the Commission.

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[59] Although it has never been disputed that the municipal preference is applicable to initial licensings, and although the Commission has been issuing initial water power licenses for almost 60 years, there are no court decisions and few Commission decisions on the "public interest" standard of Section 7(a). In *Holyoke Water Power Co., et al.*, Project Nos. 2004 and 2014, 8 FPC 471 (1949), wherein it was said, at 487, that the preference under Section 7(a) "is not an absolute one", a municipality that was unable and unwilling to meet its competitor's plans was denied an initial license. And in *Pacific Northwest Power Company*, Project Nos. 2243 and 2273, 31 FPC 247 (1964); affirmed *sub nom Washington Public Power Supply System* v. *Federal Power Commission*, 358 F.2d 840 (D.C. Cir. 1966); reversed on other grounds *sub nom Udall* v. *Federal Power Commission*, 387 U.S. 428 (1967), a Commission majority indicated by way of dictum, at 270, that after a hearing

> . . . we would then determine if preference accrues to the [municipality], and the effect of such a preference, if any, in the light of all the other factors relevant to a disposition of these [competing licensing] applications . . . .

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL78-43

CITY OF BOUNTIFUL, UTAH
UTAH POWER AND LIGHT COMPANY
CITY OF SANTA CLARA, CALIFORNIA
PACIFIC GAS AND ELECTRIC COMPANY

OPINION NO. 88-A

ORDER DENYING REHEARING

(Issued August 21, 1980)

Before Commissioners: CHARLES B. CURTIS, *Chairman*;
GEORGIANA SHELDON, and
GEORGE R. HALL.

On June 27, 1980, the Commission issued Opinion No. 88 in this proceeding for a declaratory order. There we determined that the preference in Section 7(a) of the Federal Power Act for states and municipalities is applicable against a non-state, non-municipal original licensee in a competitive relicensing proceeding, if the state or municipal applicant's plans are "equally well adapted to conserve and utilize in the public interest the water resources of the region." [1] The members of the Hydroelectric Utility Company Group,[2] Carolina Power and Light Company, Montana Power Company, Pacific Gas and Electric Company, Utah Power and Light Company, and Wisconsin Power and Light Company have filed applications for rehearing urging us to vacate our order and reverse our determination. The "Public Power Parties", comprising the Cities of Santa Clara, California, and Bountiful, Utah, the Clark-Cowlitz Joint Operating Agency, and the American Public Power Association, have jointly filed

[1] 16 U.S.C. § 800(a) (1976).

[2] See Opinion No. 88 (issued June 27, 1980) (*mimeo* at 9 n.14).

an application for rehearing requesting that we delete from Opinion 88 the explication of the public interest standard that we must apply to decide, in any particular relicensing proceeding, whether a state's or municipality's plans are "equally well adapted".

The private power interests do not raise any new theories in their application for rehearing. They argue in more detail about the background and legislative history of the Federal Water Power Act. The Commission has reviewed the arguments of the parties on the meaning of the legislative history as those arguments have been made initially and expanded upon in the various applications for rehearing.

As we indicated in Opinion No. 88, nothing in either the intrinsic or the extrinsic evidence on the meaning of Section 7(a) is clearly dispositive of the question before the Commission. The Commission has, in Opinion No. 88, attempted to give full effect to the general purpose of Section 7(a), in the context of Part I of the Federal Power Act, and reflected then on the lengthy and occasionally opaque legislative history. Nothing in the most recent arguments persuades us that we should reverse our determination made in Opinion No. 88.

In light of all of the available evidence of the legislative intent, we concluded that the interpretation more consistent with the purposes of the statute is that the state/municipal preference is applicable against a "private" original licensee in relicensing competitions if the state's or municipality's plans are "equally well adapted", and we are not persuaded to change that conclusion. In addition, we find no merit in the rehearing application of the "Public Power Parties." Accordingly, we shall deny rehearing.

The Commission orders:

The application for rehearing submitted in this Docket No. EL78-43 are denied.

By the Commission. Chairman Curtis voted present.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7641

D.C. Docket No. EL 78-43, ER 78-43
88 (80-2083 & 80-2275 Consol. in D.C.)
(80-1865 & 80-1871 Consol. in D.C.)

ALABAMA POWER COMPANY, UTAH POWER & LIGHT COMPANY, PACIFIC GAS & ELECTRIC COMPANY, THE MONTANA POWER COMPANY, WISCONSIN POWER & LIGHT COMPANY, AND PACIFIC POWER & LIGHT COMPANY,

Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petitions for Review of an Order of the
Federal Energy Regulatory Commission

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petitions of Alabama Power Company, Utah Power & Light Company, Pacific Gas & Electric Company, the Montana Power Company, Wisconsin Power & Light Company and Pacific Power & Light Company for review of an order of the Federal Energy Regulatory Commission, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the Federal Energy Regulatory Commission is AFFIRMED.

September 17, 1982

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7641

ALABAMA POWER COMPANY, et al.,
Petitioners,

versus

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Petition for Review of an Order of the
Federal Energy Regulatory Commission

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 17, 1982, 11 Cir., 198 , —— F. 2d. ——).

(November 12, 1982)

Before RONEY, TJOFLAT and HATCHETT, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judge who are in regular active service not having voted

in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ Joseph W. Hatchett

United States Circuit Judge

PARTIES TO THE PROCEEDING

The following were parties to the proceeding in the court whose judgment is sought to be reviewed:

PETITIONERS

Alabama Power Company, Inc.
The Montana Power Company
Pacific Gas and Electric Company
Pacific Power & Light Company
Utah Power & Light Company
Wisconsin Power & Light Company

INTERVENORS IN SUPPORT OF PETITIONERS

Appalachian Power Company
Arkansas Power & Light Company
Baltimore Gas & Electric Company
Carolina Power & Light Company
Central Maine Power Company
Connecticut Light & Power Company
Duke Power Company
Georgia Power Company
Hartford Electric Company
Holyoke Water Power Company
Idaho Power Company
Jersey Central Power & Light Co.
Louisville Gas & Electric Company
Minnesota Power & Light Company
New England Power Company
New York State Electric & Gas Co.
Niagara Mohawk Power Corp.
Northern States Power Company
Pennsylvania Electric Company
Pennsylvania Power & Light Co.
Portland General Electric Co.
Public Service Company of Indiana
Public Service Electric & Gas Co.
Puget Sound Power & Light Co.

South Carolina Electric & Gas Co.
Southern California Edison Co.
Union Electric Company
Virginia Electric & Power Co.
Washington Water Power Co.
Western Massachusetts Electric Co.
Wisconsin Electric Power Co.
York Haven Power Company

RESPONDENT

Federal Energy Regulatory Commission

INTERVENORS IN SUPPORT OF RESPONDENT

American Public Power Association
City of Bountiful, Utah
City of Santa Clara, California
Clark-Cowlitz Joint Operating Agency, Washington

PARENTS, SUBSIDIARIES AND AFFILIATES OF PETITIONERS

Petitioners Pacific Gas and Electric Company and Wisconsin Power & Light Company have no publicly-traded subsidiaries or affiliates.

PERTINENT SECTIONS OF THE FEDERAL POWER ACT

Sec. 7. (a) In issuing preliminary permits hereunder or licenses where no preliminary permit has been issued and in issuing licenses to new licensees under section 15 hereof the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the

plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.

(b) Whenever, in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself, the Commission shall not approve any application for any project affecting such development, but shall cause to be made such examinations, surveys, reports, plans, and estimates of the cost of the proposed development as it may find necessary, and shall submit its findings to Congress with such recommendations as it may find appropriate concerning such development.

(c) Whenever, after notice and opportunity for hearing, the Commission determines that the United States should exercise its right upon or after the expiration of any license to take over any project or projects for public purposes, the Commission shall not issue a new license to the original licensee or to a new licensee but shall submit its recommendation to Congress together with such information as it may consider appropriate.

Sec. 14. (a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee, all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken,

not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee, serviceable, and dependent as above set forth but not taken, as may be caused by the severence therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this Act, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States of any State or municipality to take over, maintain, and operate any project licensed under this Act at any time by condemnation proceedings upon payment of just compensation is hereby expressly reserved.

(b) No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 15. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its right to take over any project or projects. Thereafter, the Commission, if it does not itself recommend such action pursuant to the provisions of section 7(c) of this Part, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 15(a), for two years after the date of issuance of such order, after which period the stay shall terminate, unless

terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection.

Sec. 15. (a) That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts, as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the original licensee, upon reasonable terms, then the Commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the original license until the property is taken over or a new license is issued as aforesaid.

(b) In issuing any licenses under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only

on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency, or another Federal Agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587; 16 U.S.C. 828-828c), every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

Sec. 22. That whenever the public interest requires or justifies the execution by the license of contracts for the sale and delivery of power for periods extending beyond the date of termination of the license, such contracts may be entered into upon the joint approval of the Commission and of the public-service commission or other similar authority in the State in which the sale or delivery of power is made, or if sold or delivered in a State which has no such public-service commission, then upon the approval of the Commission, and thereafter, in the event of failure to issue a new license to the original licensee at the termination of the license, the United States or the new licensee, as the case may be, shall assume and fulfill all such contracts.